

REPUBLIC OF TURKEY

ANKARA UNIVERSITY

GRADUATE SCHOOL OF SOCIAL SCIENCES

**DEPARTMENT OF INTELLECTUAL PROPERTY RIGHTS, TECHNOLOGY
POLICIES AND INNOVATION MANAGEMENT**

THE PRINCIPLE OF DIGITAL EXHAUSTION

Master's Thesis

Sena KONTOĞLU

Ankara 2020

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DECLARATION

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To The Directorate Of Graduate School Of Social Sciences

I hereby declare that all information in my master thesis titled “The Principle of Digital Exhaustion” which has been prepared under Assist. Prof. Dr. Zehra ÖZKAN ÜNER’s supervision has been gathered and submitted in compliance with academic rules and ethical conduct principles and the data obtained from other sources have been duly indicated both in the text and references. I also declare that I have acted according to scientific research and ethical rules during the study process and if otherwise come forth, I will accept all legal consequences. (..../..../.....)

Sena KONTOĞLU

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	IV
----------------------------	----

INTRODUCTION	1
--------------------	---

§ CHAPTER I

COPYRIGHT EXHAUSTION: SCOPE AND CHARACTER	4
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I. Copyright.....	4
A. Copyright in General	4
B. Subject Matter of Copyright	6
1. Definition and Scope	6
2. Requirements for Copyright Protection.....	7
C. Rights Conferred by Copyright.....	10
1. Moral Rights	10
2. Economic Rights.....	13
II. Copyright Exhaustion.....	14
A. Right of Distribution as a Focal Point of Copyright Exhaustion.....	15
1. The Exclusive Distribution Right in General	15
2. Distribution Through Rental, Lease and Lending	19
3. Distribution Through Transfer of Ownership	20
B. Framework of Copyright Exhaustion	21
1. Definition and Scope	21
2. Bases for the Exhaustion Principle	23
3. Benefits of the Exhaustion Principle	25
4. Legislative Background	29
5. Requirements of the Exhaustion Principle.....	32
6. Geographical Application	34

§ CHAPTER II

DIGITAL EXHAUSTION OF COPYRIGHT.....	37
I. Definition and Scope of the Principle of Digital Exhaustion	37
II. Legal Nature and Classification Dilemmas of Digital File Transfers	38
A. The Sale-License Dichotomy.....	40
1. Transfer of Ownership: A Key Concept of The Principle of Exhaustion.....	40
2. Differentiating Sales and Licenses	42
3. Practice and Court Decisions	46
B. Distribution v. Communication to the Public	49
1. Differentiating Distribution and Communication to the Public.....	49
2. Practice and Court Decisions	53
C. Technological Requisite of Transfers: Making Copies	55
1. Legislative Background	56
2. The Temporary Copy Dilemma.....	58
3. Reproductions as New Copies of Work.....	61
III. Tom Kabinet Ruling: An End to Digital Exhaustion?	63
A. Background of the Case	63
B. Key Aspects of the Court's Decision.....	65
IV. Reconsideration of the Principle of Digital Exhaustion	67
A. A Different Perspective to the Key Problems in Applicability	67
1. The Sale-License Gulf	68
2. Distribution v. Communication to the Public: The Tangibility Dilemma	71
3. Technological Blip: The Reproduction Predicament.....	72
B. The Need for the Principle of Digital Exhaustion	74
CONCLUSION	78
BIBLIOGRAPHY.....	87

ABSTRACT	100
ÖZET	101



LIST OF ABBREVIATIONS

<i>Allposters</i>	: Art & Allposters International BV v Stichting Pictoright, EU:C:2015:27
Berne Convention	: The Berne Convention for the Protection of Literary and Artistic Works
CD	: Compact Disc
CJEU	: Court of Justice of the European Union
Directive 2001/84/EC	: Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art
e.g.	: example
Eds.	: Editors
EEA	: European Economic Area
EU	: European Union
EULA	: End user license agreement
i.e.	: <i>id est</i> (in other words)
Ibid	: <i>Ibidem</i> (in the same place)
ILO	: International Labour Organization
InfoSoc Directive	: 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

JIPITEC : Journal of Intellectual Property, Information Technology and E-Commerce Law

Nintendo : Judgement of 23 January 2014 Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl, 9Net Srl,

OEM : Original Equipment Manufacturer

p. : Page

pp. : Pages

P2P : Peer-to-peer

para. : Paragraph

RAM : Random access memory

ReDigi : Capitol Records, LLC v. ReDigi Inc., No. 16-2321 (2d Cir. 2018)

Rental Directive : Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Rome Convention : The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

Software Directive	: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
<i>Tom Kabinet</i>	: Judgment of the Court (Grand Chamber) of 19 December 2019 <i>Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others</i>
TRIPS Agreement	: Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	: Universal Copyright Convention
UCLA	: University of California, Los Angeles
US	: United States of America
USB	: Universal Serial Bus
USCA	: United States Copyright Act
<i>UsedSoft</i>	: <i>UsedSoft GmbH v. Oracle International Corp.</i>
<i>VOB v Stichting</i>	: Judgment of 10 November 2016, <i>Vereniging Openbare Bibliotheken v Stichting Leenrecht</i> , EU:C:2014:25
WCT	: WIPO Copyright Treaty
WIPO	: World Intellectual Property Organization
WPPT	: WIPO Performances and Phonograms Treaty

INTRODUCTION

The growing advancements in technology and the increase of the effect of these state of affairs on everyday lives has started to lead to questions on how pre-existing regulations are to be implemented. While current laws are equipped to protect the interest of parties in the legal field in traditional analogue transactions, they may pose infringements of the rights that persons involved are allowed regarding the analogue counterparts of the digital transactions. These issues have also been posed as regards to copyright law.

As technology advances, so does the convenience of everyday affairs. For example, while carrying a book during the day may be inconvenient, the utilization of e-readers and applications make reading easier. People no longer have to add to the weight of their belongings and can access the book easier whenever they so wish. This example, and countless others that can be given regarding the digitalization of everyday affairs, means that not only users but creators are choosing to use technology for their transactions.

While the rights of copyright owners and the users/holders of copyrighted works in tangible media are provided for in previous and current laws clearly, the consequences of the current laws limitations for digital processes is largely overlooked. While, for example, a tangible book's copyright owners' and users' right are clear, the same cannot be said for e-books. The distribution right and the applicability of the exhaustion principle is set and clear for tangible books, the same cannot be said for e-books. The principle to

be applied as a limitation on the right of distribution via sale or other transfer of property on works in digital media has been coined “digital exhaustion”.¹

This thesis examines the possible applicability of a digital exhaustion principle, which refers to exhaustion of the distribution right on works in digital media which have been/are transferred through digital means, *de lege lata*. Although there are many ways to transfer work in digital media, this thesis will focus on the transfer of digital works independent from tangible media.

The applicability of a possible principle of digital exhaustion raises questions of differences between transactions in works in tangible media and those in digital media, namely the issue of the legal nature and classification of digital file transfers. The application of the principle of exhaustion requires fundamentally that a copyrighted work be distributed lawfully through sale or other transfer of property by the copyright owner or with their consent, without prejudice to geographical application provisions. The evaluation of the applicability of the principle of digital exhaustion would depend on whether transactions on works in digital media are sales or licenses, whether the transfer of works in digital media are distribution or communication to the public per applicable law, and whether temporary copies made per the nature of digital transmissions would pose copyright infringement thus preventing lawful application of the principle. This thesis examines the questions raised as regards to Turkish, and EU Laws, with specifications in legal issues and relevant case law.

¹ A. Perzanowski, J. Schultz, 2011, “Digital Exhaustion”. *UCLA Law Review*, p. 892

This thesis is comprised of an introduction, a conclusion and two main bodies. Chapter I briefly examines the scope of copyright and copyright exhaustion. Chapter II focuses on the principle of digital exhaustion, the challenges it faces in light of novel technological transactions and their legal classification in light of copyright legislation, together with the current stance of the CJEU and Turkish Court of Cassation.



§ CHAPTER I

COPYRIGHT EXHAUSTION: SCOPE AND CHARACTER

I. Copyright

A. Copyright in General

Copyright is a type of property right bestowed upon the creators of various types of intellectual works.² Property right is a referral to a concept that some denote as “the right to a thing”.³ The ‘thing’ as referred to in the explanation of the concept refers to anything tangible and intangible other than persons.⁴ The concept is to do with the relationship between a ‘thing’ and an individual, with the effect of the relationship in question on the outer world, i.e. other than the thing and the individual.⁵ It is usually defined as the broadest *right in rem* over the ‘thing’, i.e. the property in question.⁶

² D. I. Bainbridge, **Intellectual Property**, Glasgow, 2007, p. 5; G.P. Cornish, **Copyright: Interpreting the Law for Libraries, Archive and Information Services**, Oxford, 2015, p. 1.; Republic of Turkey, Court of Cassation General Assembly of Civil Chambers, 2014/12-946 E. 2016/296 K. 09.03.2016.

³ J.E. Penner, **The Idea of Property in Law**, Oxford, 2003, p. 2.

⁴ J. Akipek, T. Akıntürk, D. Ateş, **Eşya Hukuku**, İstanbul, 2018, p. 25.

⁵ M. Bridge, **Personal Property Law**, New York, 2002, p.12.

⁶ J. Akipek, T. Akıntürk, D. Ateş, , 2018, p. 19; K. Oğuzman, Ö. Seliçi, S. Oktay-Özdemir, **Eşya Hukuku**, İstanbul, 2018, p. 274.; see Article 683 of Turkish Civil Law No. 4721: “A person who owns a thing, within the limits of law, has the power to use, benefit from, and dispose of that thing at his or her discretion. The owner, may claim an action of recovery as well as any action to prevent all kinds of unjust possession to the person who possesses their property unjustly.”

The idea behind intellectual property rights is that protection should be granted to works that derive from the “self”, and as part of intellectual property rights, copyright ensures the protection of works processed by extension of “self”.⁷ The product of a person’s thinking process and intellectual creation are protected provided that they are recognized by law as private property.⁸ The right is a property right and grants owners the rights as regards to disposal of the owner. These rights are called copyright, as historically in the custom of the booktrade in London, the publishers had exclusive rights to their ‘copies’.⁹

The prime objective of copyright is to encourage and remunerate the creators of intellectual product for their creations, as well as the entrepreneurs for their risk of capital in putting said creations before the public; which was accomplished by the allowance of exclusive rights to owners of copyright. . The vitality of copyright is that via this encouragement and enumeration, it ensures the continued growth of the creation process generally, as without protection creations would be freely controlled by others in any way possible; in which sense the purpose of copyright mirrors that of the purpose of property.¹⁰ It’s defined as “a stimulus for people to create.”¹¹ This purpose is highlighted in various legislation such as the US Constitution, that states: “*Congress shall have the power to...*

⁷ P. Goldstein, B. Hugenholtz, **International Copyright: Principles, Law, and Practice**, Oxford, 2010, pp. 1-4.

⁸ M. Vittoria, H.I.L. Laddie, P. Prescott, **The Modern Law of Copyright and Designs. Vol. 1**, London, 2011, pp. 3-4.

⁹ Ibid, p. 8.

¹⁰ D. I. Bainbridge, 2011, p. 29-34.; G.P. Cornish, 2015, p. 1.

¹¹ G.P. Cornish, 2015, p. 1.

promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹²

In this frame of reference, copyright has been adopted to provide protection to works of intellectual effort.

B. Subject Matter of Copyright

1. Definition and Scope

Protection granted by copyright is not directly to the owner but to the “work”; expressly, only the economic and moral rights of the copyright owner and third persons are given protection, not the copyright owners themselves.¹³ The works granted protection by copyright are literary and artistic works, products created within a literary, scientific or artistic field, and that are fixed in a medium that bear characteristics of the owner.¹⁴ The Berne Convention for the Protection of Literary and Artistic Works (“**Berne Convention**”) defines subject matter of copyright as “*every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression*”, in addition to derivative works like collective works such as encyclopaedias provided that

¹² U.S. Const. Art. I, § 8

¹³ E. E. Hirsch, **Hukuki Bakımdan Fikri Say**, İstanbul, 1943, p.6; C. Suluk, A. Orhan, **Uygulamalı Fikri Mülkiyet Hukuku Cilt II Genel Esaslar Fikir ve Sanat Eserleri**, İstanbul, 2005, p. 116; Ü. Tekinalp, **Fikri Mülkiyet Hukuku**, İstanbul, 2012, p. 145.

¹⁴ P. Goldstein, B. Hugenholtz, 2010, pp. 36-37.; C. Suluk, A. Orhan, 2005, p. 116.

they constitute intellectual creations, and translations.¹⁵ The Agreement on Trade-Related Aspects of Intellectual Property Rights (“**TRIPS Agreement**”) and the WIPO Copyright Treaty (“**WCT**”) expand on copyright protected subject matter as per the Berne Convention and also provide that member states give copyright protection to computer programs, and compilations of data or other material.¹⁶ Similarly in Turkish and US laws, “works” subject to copyright are formally defined in the Law No. 5846 on Intellectual and Artistic Works as “*any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work*”¹⁷, and “*Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device*”¹⁸ respectively.

2. Requirements for Copyright Protection

Not all intellectual products are granted protection under copyright. The main requirements for copyright, are that there be an intellectual or artistic work created as a result of intellectual effort that bears the characteristics of the owner.¹⁹

¹⁵ Berne Convention, Art. 2.

¹⁶ TRIPS Agreement, Art. 10; WCT, Art. 4-5.

¹⁷ Law of Intellectual and Artistic Works, Art. 1/B.

¹⁸ 17 USCA, § 102.

¹⁹ S. Karahan, C. Suluk, T. Saraç, & T. Nal, **Fikri Mülkiyet Hukukunun Esasları**, Ankara, 2015, p. 42.

The first requirement for copyright protection, is that there be an intellectual or artistic work that can be perceived by others.²⁰ The idea itself is not protected but the way in which the idea is presented is the subject of protection; thus the idea must be set in a tangible form and not be at the level of process of thought.²¹ The “work” need not be complete and need only reach a certain stage where it can be perceived objectively, thus may be a sketch, draft or rough copy.²²

The second requirement to attain protection by copyright is that the work to be subjected to copyright is that the “work” in question of copyright bear the characteristics of its author.²³ This requirement is in line with Turkish legislation which aims to protect the way in which thoughts are expressed.²⁴ A criteria that may be adopted for this requirement is that the work be a distinctive product, and not a copy.²⁵ This requirement differs in civil law and common law traditions, civil law states seek the imprint or essence of the owner while common law states require simply that it not be copied. Though civil law

²⁰ C. Suluk, A. Orhan, 2005, p. 145; S. Karahan, C. Suluk, T Saraç, & T. Nal, p. 47.

²¹ C. Suluk, A. Orhan, 2005, p. 119; P. Goldstein, B. Hugenholtz, 2010, p.5; S. Bozbel, **Fikri Mülkiyet Hukuku**, İstanbul, 2015, p. 30.

²² Ü. Tekinalp, 2012, pp. 108-109; S. Bozbel, 2015, p. 30.

²³ C. Suluk, A. Orhan, 2005, pp. 141-142; M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 8; Ş. Erel, 2009, p. 52.; S. Karahan, C. Suluk, T Saraç, & T. Nal, p. 43.

²⁴ C. Suluk, A. Orhan, 2005, p. 143; If the end product is something that can be produced by anyone, there is no benefit in the protection of those products so these will not be subject to the protection offered copyright: E. E. Hirsch, 1943, p. 12

²⁵ M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 8; P. Goldstein, B. Hugenholtz, 2010, p. 189.; Ş. Erel, **Türk Fikir ve Sanat Hukuku**, Ankara, 2009, p. 52.; W. Cornish, D. Llewelyn, **Intellectual Property Patents, Copyright, Trade Marks and Allied Rights**, London, 2007, p. 417

states require originality, this is not an elevated standard as novelty is not sought after; the aesthetic value is not taken into consideration but the contribution of the author.²⁶

The third requirement for copyright protection is the requirement as to form which commands that the work in question be one that can be classified under the categories of works as provided for in the Act.²⁷ This requirement, to correspond to a category of work is not a compulsory requirement and implemented differently in different jurisdictions.²⁸ The categories of works subject to copyright have been provided by the Universal Copyright Convention “UCC” and the Berne Convention in an extensive, not comprehensive manner.²⁹ The Berne Convention has granted member states right to determine the list, if any.³⁰

The Turkish Law of Literary and Artistic Works, subjects categories of works to a *numerus clausus* principle though the types of works under each category are not.³¹ Works like adaptations and collections that are created by the utilization of other works that embody the essence of their owner but are not independent from the original works on which they are based or which they utilize, are also deemed “work” subject to

²⁶ P. Goldstein, B. Hugenholtz, 2010, pp. 189-191: For example, German law protects *kleine Münze* (small changes) to existing material while the Dutch Copyright Act protects all other writings including address books and telephone directories.

²⁷ C. Suluk, A. Orhan, 2005, p. 146; Ş. Erel, 2009, p. 55; S. Karahan, C. Suluk, T. Saraç, & T. Nal, p. 43.

²⁸ P. Goldstein, B. Hugenholtz, 2010, pp. 194-195: While countries such as the UK and Austria adopt an exhaustive list of categories, most civil law countries like Germany offer copyright protection to works that carry the requirements of copyright protection but fall outside of the set categories of works.

²⁹ Berne Convention, Article 2; UCC, Article I.

³⁰ Berne Convention, Article 2(2); Ü. Tekinalp, 2012, p. 113.; S. Bozbel, 2015, p. 25.

³¹ F. Öztan, **Fikir ve Sanat Eserleri Hukuku**, Ankara, 2008, p. 91.; Ü. Tekinalp, 2012, p. 150.

copyright as per Turkish Law.³² Thus the categories from which works are subject to copyright in lieu with Turkish Law are literary and scientific works, musical works, cinematographic works, and works of the fine arts.

C. Rights Conferred by Copyright

Copyrights, as stated above, are a type of property rights. As with all types of property, copyrights also grant certain rights to their owners. These rights are commonly classified as economic rights and moral rights.³³

1. Moral Rights

Moral rights, or “*droit moral*”, are designed to protect the notion that works subject to copyright carry an essence of “self”.³⁴ These rights are rights that are regarding personal rights of the creators of works subject to copyright.³⁵ Moral rights may be relinquished but cannot be allocated to a third party.³⁶

³² E. Gökyayla, **Telif Hakkı ve Telif Hakkının Devri Sözleşmesi**, Ankara, 2001, p. 76.

³³ E. E. Hirsch, 1943, p. 117; F. Öztan, 2008, p. 281; S. Bozbel, 2015, p. 97; Ş. Erel, 2009, p. 33; Ü. Tekinalp, 2012, p. 14.; E. A. Atar, **Fikir ve Sanat Eserleri Hukukunda Yayma Hakkı ve Korunması**. İstanbul, 2017, p. 75; M. Ateş, **Fikir ve Sanat Eserleri Üzerindeki Hakların Kapsamı ve Sınırlandırılması**.Ankara, 2003, p. 120.

³⁴ G.P. Cornish, 2015, p. 13; M. Rushton, 1998, “The Moral Rights of Artists: Droit Moral ou Droit Pecuniaire?”, **Journal of Cultural Economics**, p. 15.

³⁵ E. A. Atar, 2017, p. 75; M.T.S. Rajan, “Moral Rights: The Future of Copyright Law?”, **Journal of Intellectual Property Law & Practice**, 2019, p. 257; A. Kılıçoğlu, **Sınai Haklarla Karşılaştırmalı Fikri Haklar**, Ankara, 2013, p. 260; C.P. Rigamonti, 2006, “Deconstructing moral rights”. **Harvard International Law Journal**, p. 355.

³⁶ D. I. Bainbridge, 2007, p. 117; G.P. Cornish, 2015, p. 14; M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 15.; N. Ayiter, **Hukukta Fikir ve Sanat Ürünleri**, Ankara, 1981, p. 206.

The Berne Convention is an important international legal source for moral rights. Although a weak statement, the Berne Convention became one the most important as the TRIPS Agreement explicitly excluded moral rights.³⁷ The article on moral rights, Article 6bis, was later incorporated into the WCT, laying down two main moral rights provisions on an international level.³⁸ Two main moral rights are regulated by the Berne Convention: “the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”³⁹ The two other main moral rights are the right to publicise a work and the right to remove a work from circulation.⁴⁰

There are different stances, especially between codified legislation and doctrine views on the exhaustibility of the list of moral rights, mainly due to the point from which they stem. The Berne Convention and the Turkish Law of Literary and Artistic Works both provide for an exhaustive list of moral rights. Adversely, France adopts a perpetual stance to moral rights.⁴¹ The French stance is parallel to the doctrinal view that state that any personal right pertaining to the copyrighted work should be considered a moral right.⁴² That being said, the most commonly provided for moral rights granted to copyright owners are: the right of paternity, the right to object to any alteration, mutilation or other derogatory

³⁷ TRIPS Agreement, Article 9(1); C.P. Rigamonti, 2006, p. 357.

³⁸ C.P. Rigamonti, 2006, p. 358.

³⁹ Berne Convention, Article 6bis; M. Rushton, 1998, p. 16.

⁴⁰ M. Rushton, 1998, p. 16.

⁴¹ *ibid*, p. 17.

⁴² *see* Ü. Tekinalp, 2012, p. 162.

modification of the copyrighted work, the right to publicize the work., and the right to withdraw a work.⁴³

The paternity right, or the right to be identified as the author of a copyrighted work, is an exclusive moral right of the author, i.e. creator of the work.⁴⁴ This right also includes the right not to be named author of the work.⁴⁵ The right grants the owner the option to not name themselves on the works, that may be by publishing the work under a pseudonym or by keeping it anonymous, the choices which can be abandoned at the will of the owner. The paternity right is granted alongside the right to object to false attribution of a work. This right carries a similar purpose to moral rights that derive from the ‘self’: to protect the reputation of the individual.

The right to dispute derogatory treatment of copyrighted work is an “integrity right” of the creator of the work. Derogatory treatment consists of acts leading to the alteration or the mutilation of the work that is prejudicial to the reputation or honour of the creator.⁴⁶

The rights to disclose and withdraw are interconnected rights, which provide that the copyright owner is eligible to decide when the work can be publicized and whether and/or when it should be withdrawn.⁴⁷

⁴³ W. Cornish, D. Llewelyn, 2007, p. 486; M. Rushton, 1998, p. 16; C.P. Rigamonti, 2006, p. 355; G.P. Cornish, 2015, p. 14; M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 150.

⁴⁴ D. I. Bainbridge, 2011, p.14; C.P. Rigamonti, 2006, p. 363.

⁴⁵ C. Suluk, A. Orhan, 2005, p. 329-330.

⁴⁶ D. I. Bainbridge, 2011, p. 118; C.P. Rigamonti, 2006, p. 364.

⁴⁷ C.P. Rigamonti, 2006, p. 362.

2. Economic Rights

Another type of right provided to copyright owners are economic rights, which give copyright owners the means to exploit their rights and obtain economic remuneration from their works subject to copyright. Economic rights, contrary to moral rights, may be waived, assigned to third parties or be subject to licensing.⁴⁸ For while moral rights stem from the ‘self’ from which copyright existence is formed, economic rights are economic rights that are regarding economic remuneration of the works.

Jurisdictions have adopted common economic rights to be implemented in their copyright laws such as: rights of reproduction, to issue copies to the public via sale or other transfer of ownership, or rent, lease or rental of the work (right of distribution), perform, show or play the work in public (right of public performance), adapt or translate the work (right of adaptation), communicating the work to the public, make the work available.⁴⁹

In order to achieve a purpose of copyright laws as generally accepted, the balance amid the right of copyright owners and the continuousness of their incentive to create and thus the making accessible the creative works to the public, certain limitations to rights have been devised. These limitations that exclusive rights are subject to have become mostly uniform and one of the main instruments of copyright law, so much so that they help

⁴⁸ E.A. Atar, 2017, p. 76; F. Öztan, 2008, p. 351; Ü. Tekinalp, 2012, p. 181; A. Kılıçoğlu, 2013, p. 261; Ö. Erbek, 2009, “Fikir ve Sanat Eserlerine İlişkin Lisans Sözleşmesinin Hukuki Niteliği”, **Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi**, p. 20.

⁴⁹ D. I. Bainbridge, 2011, pp. 133-134; G.P. Cornish, 2015, p. 20; L. Bently, B. Sherman, **Intellectual Property Law**, Oxford, 2004, p. 131.

define the actual rights granted by copyright.⁵⁰ Some of the limitations include the term of protection, *inter alia*, fair dealing, private copying, public administration, making temporary copies, educational uses and to meet the needs of disabled persons.⁵¹ Among these exceptions is the exhaustion principle which brings limitations to the owners' right of distribution through the sale or other way of transfer of ownership.⁵²

II. Copyright Exhaustion

One of the purposes of copyright is the aim of the protection of cultural interest through the supply of copyrighted works for the interest of the general public. For the achievement of this purpose, copyright rules and regulations need to establish a balance amongst copyright owners' rights giving them incentive to create, and the rights of the public in ease of accessibility to the works in various ways. This balance is sought to be achieved through establishing exclusive rights to incentivize owners of copyright and subjecting those exclusive rights to provide for public advantage. In this context, the exhaustion principle has come to pass as a limitation to copyright owners' exclusive distribution right of their works.⁵³

⁵⁰ T. Dreier, "Limitations: The Centerpiece of Copyright in Distress-An Introduction", **JIPITEC**, 2010, p. 52.

⁵¹ G.P. Cornish, 2015, pp. 21-22.

⁵² P. Mezei., 2018, **Copyright Exhaustion Law and Policy in the United States and the European Union**, Cambridge, p. 7.

⁵³ P. Mezei, 2018, p. 6; Ü. Tekinalp, 2012, p. 686; A. Perzanowski, J. Schultz, 2011, p. 892; M. Aksu, "İnternet Üzerinden Yayılan Eserlerde Tükenme İlkesi? (Dijital Tükenme İlkesi?)", **Ticaret ve Fikri Mülkiyet Hukuku Dergisi**, 2016, pp. 4-5; O. Rognstad, "Legally Flawed but Politically Sound: Digital Exhaustion of Copyright in Europe after UsedSoft", **Oslo Law Review**, 2014, p. 1.; L. Oprysk, 2020, "Digital Exhaustion and the EU (Digital) Single Market, In T. E. Synodinou, P. Jougoux, C. Markou (Eds.), **EU Internet Law in the Digital Era Regulation and Enforcement** (pp. 161-180), Springer. p.164;

A. Right of Distribution as a Focal Point of Copyright Exhaustion

1. The Exclusive Distribution Right in General

An economic right granted by copyright, the right of distribution, permits the right owner to exclusively be able to launch the protected work or copies into circulation and consequently the right to exclude third parties from carrying out said operations.⁵⁴ This right includes the putting into circulation of the original or copies of the copyrighted work through commercial transaction, sale or rental.⁵⁵ The exerciser of the right of distribution has the discretion of deciding when, where, and how the works or copies thereof are distributed as well as the number of distributions.⁵⁶ Therefore, the distribution right grants owners of copyright the instance to financially exploit their works.

Copyright ensures the distribution right of copyright owners on copyrighted works. The right of distribution and exhaustion are not clearly provided as is, in all legal instruments. Currently, some documents provide for the right of distribution explicitly while others offer implied or allocated rights of distribution. Legislations also differ on the way that

J. P. Liu, 2001, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership." **William and Mary Law Review**, p. 1292.

⁵⁴ Article 4(1) InfoSoc Directive; Article 4 Software Directive; Article 23 of Turkish Law of Literary and Artistic Works; E.A. Atar, 2017, p. 77; M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 703; A. Perzanowski, J. Schultz, 2011, p. 893; A.R. Puig, "Copyright Exhaustion Rationales and Used Software-A Law and Economic Approach to Oracle v. UsedSoft", **JIPITEC**, 2013, p. 15;

⁵⁵ E.A. Atar, 2017, p. 77; C. Suluk, A. Orhan, 2005, p. 393; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 97; Z. Özkan, **Karşılaştırmalı Hukukta Müzik Eserlerinin Dijital İletimi**. Ankara, 2008, p. 92.

⁵⁶ E.A. Atar, 2017, p. 77; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 97.

the right of distribution is presented, some provide for the right of distribution in general for transfer of property, rental and lending, whilst some provide for the right of distribution independently through transfers of property, and rental and lending.⁵⁷

An example of national legislation where the right of distribution is explicitly provided for, in general for transfers of property, and rental and lending, is Turkish Law where the Law states: *“Provided that the authorities of rental and public lending remain with the author, the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the rightholder shall not infringe the right of distribution granted to the author.”*⁵⁸ Likewise, US Copyright Act of 1976 (“USCA”) explicitly regulates the right of distribution as the right *“to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;”*⁵⁹

One of the examples for legislation where the right of distribution is implied is the Berne Convention, where the distribution right isn’t devised as an independent economic right but allocated as a right to authorize the dissemination of adaptation and reproductions.⁶⁰ Likewise, the TRIPS Agreement does not regulate openly the right of distribution or the exhaustion principle, stating *“nothing in this Agreement shall be used to address the issue*

⁵⁷ E.A. Atar, 2017, p. 79

⁵⁸ Law of Literary and Artistic Works, Art. 23.

⁵⁹ 17 USCA, § 106

⁶⁰ Berne Convention, Art. 14

of the exhaustion of intellectual property rights.”⁶¹ By not providing an explicit provision regarding exhaustion, the TRIPS Agreement permits signatories adopt the principle as they wish.⁶²

WIPO Treaties have adopted explicitly, the right of distribution, but have adopted separate legislation for distribution through transfers of ownership and, rental and lending. The WIPO Performances and Phonograms Treaty (“WPPT”) and the WCT deliver a distribution right explicitly and independently. Article 6 of the latter openly states that “*Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.*”⁶³ The rental of computer programs and cinematographic works is independently regulated with Article 7 of the WCT.⁶⁴ Article 8 of the WPPT titled “the right of distribution” grants the same rights for performers that is provided for copyright owners in the WCT, that they “*shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.*”⁶⁵

EU Law provides for the right of distribution under different directives, some where the transfer of property and, rental and lending is mentioned in the same provision, and some where these two different ways with which distribution is attained are separated. Directive

⁶¹ TRIPS Agreement, Art. 6

⁶² A. Pope, “A Second Look at First Sale: An International Look at Copyright Exhaustion”, **Journal of Intellectual Property Law**, 2011, p. 215.

⁶³ WCT, Article 6(1)

⁶⁴ WCT, Article 7

⁶⁵ WPPT, Art. 8.

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 (**“InfoSoc Directive”**) explicitly regulates copyright owners’ distribution right Article 4 states: *“Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.”*⁶⁶

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (**“Software Directive”**), contains a provision whereby the distribution right is granted explicitly on both transfer of property and, rental and lending.⁶⁷ An example of legislation where the right of distribution is referred to solely through rental and lending is Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (**“Rental Directive”**), as the legislation regulates only rental and lending.⁶⁸

The distribution right extends to the creation itself and copies thereof. The creation in this case refers to the literary or artistic work created that bears the character of its author, that is under copyright protection. The copies of the work are duplicates that have been produced from the specific work or previous copies. Both of these types of works are subject to the exclusive distribution right.⁶⁹ Owners of copyright are allowed to use the

⁶⁶ InfoSoc Directive, Art. 4.

⁶⁷ Software Directive, Art. 4.

⁶⁸ Rental Directive, Art. 9

⁶⁹ E.A. Atar, 2017, pp. 85-86

exclusive right to distribute as regards to renting, lending, selling or distributing in any other commercial way their original works or copies thereof.

2. Distribution Through Rental, Lease and Lending

Rental⁷⁰, lease⁷¹ and lending⁷² are legal transactions that enable the transfer of the right to use and enjoy the thing in question of the transaction.⁷³ While rental and lease require consideration in exchange for the transfer, lending refers to a transaction without a consideration in exchange.⁷⁴

These transactions have been expressly provided for, and defined as is, with the Rental Directive⁷⁵, which was adopted to ensure uniformity between EU member states to facilitate changing procedures in the commercial use of intellectual and artistic works

⁷⁰ Definition of rent: “to hire an object or real property for a period of time (or for an open-ended term) for specified payments.” at <https://dictionary.law.com/Default.aspx?selected=1790>

⁷¹ Definition of lease:“ 1) n. a written agreement in which the owner of property (either real estate or some object like an automobile) allows use of the property for a specified period of time (term) for specific periodic payments (rent), and other terms and conditions. Leases of real property describe the premises (often by address); penalties for late payments, termination upon default of payment or breach of any significant conditions; increases in rent based on cost of living or some other standard; inclusion or exclusion of property taxes and insurance in rent; limitations on use (for a butcher shop, a residence for the family only, no pets); charges for staying on beyond the term (holding over); any right to renew the lease for another period; and/or a requirement for payment of attorneys' fees and costs in case of the need to enforce the lease (including eviction). A lease is distinguished from a mere renting of the premises on a month-to-month basis and cannot exceed a year unless agreed to in writing. A "triple net" lease includes both taxes and insurance in the rent. 2) v. to rent out real property or an object pursuant to a written agreement.”at <https://dictionary.law.com/Default.aspx?selected=1122>

⁷² Definition of lend according to Cambridge Dictionary: “to give something to someone for a short period of time, expecting it to be given back” at <https://dictionary.cambridge.org/dictionary/english/lend>

⁷³ M. Ateş, 2003, p. 416.

⁷⁴ *ibidem*.

⁷⁵ Directive 2006/115/EC, Art. 2.

within Europe.⁷⁶ The Directive has been codified in the national laws of member states as well as pre-accession states, like Turkey.⁷⁷

Article 2 of the Rental Directive expresses the terms rental and lending as “*making available for use, for a limited period of time and for direct or indirect economic or commercial advantage*” and “*‘lending’ means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public*” respectively.⁷⁸

Although the right to lend was given to copyright owners as a solitary right in Turkish Law, the right was classified under the right of distribution with the amendments made to the Law of Intellectual and Artistic Works in 2001, with the preamble stating that the harmonization in an international level at a technical level was aimed by including the right to lend in the existing law.⁷⁹

3. Distribution Through Transfer of Ownership

Distribution through sale or other transfer of property refers to the transfer of the original work or copies of the work thereof, to a third party through a transfer with or without

⁷⁶ E.A. Atar, 2017, p. 87.

⁷⁷ M. Ateş, 2003, p. 416; E.A. Atar, 2017, p. 86; Accordingly, the right of rental was provided for under the right of distribution in 2001 following amendments to the Law of Literary and Artistic Works in Turkey. The preamble to the amending provision

⁷⁸ Rental Directive, Art. 2.

⁷⁹ Z. Özkan, “Ödünç Verme Hakkı ve Kamuya Ödünç Verme Lisansı Kapsamında E-Kitaplar”, **Terazi Hukuk Dergisi**, 2017, p. 34.

consideration.⁸⁰ The main point in this instance is that there be a transfer of ownership; the work or copies thereof can be subject to a sale, i.e. in exchange for currency, or the ownership can be transferred by other contracts such as barter contracts or through deed of gift.⁸¹

To achieve the balance of both benefits for the copyright owner and the public interest, limitations have been brought to the exclusive right to distribute, like other economic rights granted by copyright. These can be listed, in an inexhaustive list, as limitations as to period of time, limitation as to geographic implications and the principle of exhaustion, limitations to ensure public order, limitations for general interest, and limitations for special interest.⁸²

B. Framework of Copyright Exhaustion

1. Definition and Scope

Among the key objectives of the design of copyright is to assure preservation of cultural interests and the increase of the supply of cultural products for the interests of the public. Limitations to exclusive rights provided in accordance with protection offered by copyright are made to deliver a balance amongst these benefits and the rights of copyright

⁸⁰ E.A. Atar, 2017, p. 96.

⁸¹ E.A. Atar, 2017, p. 96; Kılıçoğlu, 2013, p. 290.

⁸² E.A. Atar, 2017, p. 110.

owners.⁸³ This balance amongst the interest of the public in the supply of cultural products and the rights of copyright owners are especially important for the perpetuity of the supply of these products as incentivizing potential copyright owners is key. The principle of exhaustion is such a limitation imposed on copyright owners' exclusive right to distribute their works through the transfer of ownership.⁸⁴

When the owner of a copyright owner sells and/or obtains an economic profit from the first trade of their work to a consumer, the right to command that specific work is said to be exhausted and the consumer is then unrestricted to make use of the specific work in any way they may choose.⁸⁵ The exhaustion principle, or first sale doctrine as referred to in US law⁸⁶, provides, in short, that once a consumer purchases or in some other way lawfully acquires a copy of a work under copyright protection, they may police that specific copy as they please. This provides that the lawful acquirement of, i.e. the transfer of property of, a copy of, or the work itself is enough and a "sale" *per se* is not required.⁸⁷

While the copyright owner is entitled to set the standards for the first distribution of a work (or a copy of), they are not authorised to contractually limit future distributions under the principle of exhaustion. Therefore, a copyright owner who, with consent,

⁸³ P. Mezei, 2018, p. 6; Ü. Tekinalp, 2012, p. 686; O. Rognstad, 2014, p. 1; A. Perzanowski, J. Schultz, 2011, p. 892; M. Aksu, 2016, p. 5.; L. Oprysk, 2020, p.162.

⁸⁴ A. Aslan. **Fikri Mülkiyet Haklarının Tükenmesi**, Ankara, 2004, p. 201; E.A. Atar, 2017, p. 119; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 97.; M. Aksu, 2016, p. 4.; P. S. Morris, "Beyond Trade: Global Digital Exhaustion in International Economic Regulation", **Campbell Law Review**, 2013, p. 114.

⁸⁵ A. Pope, p. 206.; P.S. Morris, 2013, p. 118.

⁸⁶ 17 USCA, §109; P. Mezei, 2018, p. 1.

⁸⁷ A. Perzanowski, J. Schultz, 2011, p. 893; M.V. Sardina, "Introduction, Exhaustion and First Sale in Intellectual Property", **Santa Clara Law Review**, 2011, p. 1056; UNCTAD-ICTSD, Resource Book on TRIPS and Development: 93.; A. Aslan, 2004, p. 203.; F. Öztan, 2008, p. 369.

transfers the ownership of a copy of their work lawfully to a third party no longer has control over the said copy, including the control over the economic valuation of the work. This lack of control includes the copyright owner's lack of right to any economic benefits arising from the secondary commercial transactions of the work on which their right has been exhausted.⁸⁸

2. Bases for the Exhaustion Principle

An objective of the principle is to ensure a balance amongst the exclusive rights of the copyright owner and the property rights of persons who have physical control over a specific copy of a work under copyright protection.⁸⁹ To accommodate the balance amongst the interests of society and the rights of owners of copyright, there are three main foundations on which the principle of exhaustion can be said to be formed, as to aid in the achievement of the purposes of copyright, the reward theory, the full ownership theory, and the market and legal certainty protection theory.⁹⁰

⁸⁸ For an exception to the economic remuneration of copyright owners after the application of principle of exhaustion for plastic or graphic art, i.e. the first sale see *Droit de Suite*, or artist's resale right. *Droit de suite* is the right of owners or creators of graphic and original works of art to a royalty at times of resale of their works made within the duration of the actual copyright protection. Article 14ter of the Berne Convention recognizes "*the right to an interest in any sale of the work subsequent to the first transfer by the author of the work.*" In the European Union, Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, was adopted to introduce *droit de suite* (artist's resale right). The right relates to works of art that are made by the artist or are copies that are made in limited numbers that are considered original works of art as per professional usage, and that are works of graphic or plastic art. *For more on droit de suite* see Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art; M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 16; G.P. Cornish, 2015, p. 183; C. Banternghansa, K. Graddy, "The Impact of the *Droit de Suite* in the UK: An Empirical Analysis", **Journal of Cultural Economics**, 2009.

⁸⁹ P. Mezei, 2018, p. 3.

⁹⁰ P. Mezei, 2018, p. 11.

The reward theory states that the copyright owner is authorized to freely set the initial purchase price of their work, as a fair enumeration for the transfer of property on the specific copy to then lose entitlement to any further profits.⁹¹

The full ownership or unconditioned ownership theory rules that once a work, a specific copy or the medium in which it is set is acquired by a third party, they are entitled to use all the rights granted to them by the law of property. This theory stems from the common acknowledgment of the fact that the precedence of property rights.⁹² This notion, however, has been less favoured in the last century as copyright has been embraced as a type of property right and has been subject to classifications of limitations brought to property rights such as fair uses of copyrighted material whether they be exercised by the copyright owners themselves or third parties.⁹³

The third and most modern theory on which the principle of exhaustion stands is the market and legal certainty protection theory. As per this theory, the principle of exhaustion prevents a system where consumers have to negotiate licenses for new uses of the copyrighted works they have already legally acquired. The principle facilitates legal certainty of basic principles regarding how lawful acquirers dispose of their purchases regardless of the distinctive features of different works without the costs of new negotiations or surpluses.⁹⁴ This theory originates mainly from competition law, which

⁹¹ A.R. Puig, 2013, p. 162; P. Mezei, 2018, p. 11.; M. Aksu, 2016, p. 7; M. Aksu, “Fikir ve Sanat Eserleri Hukukunda Yayma Hakkının Tükenmesi ve Avrupa Adalet Divanının 3 Temmuz 2012 Tarihli UsedSoft/Oracle Kararının Hukukumuza Bu Açıdan Etkisi Bağlamında Değerlendirilmesi”, **Ticaret ve Fikri Mülkiyet Hukuku Dergisi**, 2015, p. 5

⁹² P. Mezei, 2018, p. 11; M. Aksu, 2015, p. 5

⁹³ A.R. Puig, 2013, p. 162.; M. Aksu, 2016, p. 6

⁹⁴ A.R. Puig, 2013, p. 162.; M. Aksu, 2016, p. 7

aims to prevent the uncompetitive control of the market, in this case by copyright owners.⁹⁵

3. Benefits of the Exhaustion Principle

The limitation that is provided by the exhaustion principle to the distribution right is the basis for the achievement of pragmatic benefits to those other than the copyright owners. These benefits are ease of access, preservation of access to works which are not available to the public anymore, protection of consumer privacy, market efficiency and transactional clarity, an increase in platform competition and innovation.⁹⁶

The majority of the benefits of the exhaustion principle is achieved through the utilization of secondary markets. The principle sets forth secondary markets where copies of copyrighted works or media in which they are set can be sold exclusive of the permission or interference of the owner of copyright.⁹⁷ Through the enabling secondary markets, the principle of exhaustion increases benefit of consumers through ease of access due to the decrease in price and increase in availability.⁹⁸ The effect of the determination of the price for works in the secondary market may be evaluated as an increase or a decrease in the pricing of the first-hand sales of the work subject to copyright. The freedom of a lawful

⁹⁵ P. Mezei, 2018, p. 11.

⁹⁶ A. Perzanowski, J. Schultz, 2011, pp. 893-901. A. Perzanowski, J. Schultz, 2018, **The End of Ownership: Personal Property in The Digital Economy**. Cambridge, Massachusetts: The MIT Press. p. 75-76; C. Sganga, "A Plea for Digital Exhaustion in EU Copyright Law", **JIPITEC**, 2018, p. 212.

⁹⁷ R.A. Reese, "The First Sale Doctrine in the Era of Digital Networks", **Boston College Law Review**, 2003, p. 585-594.

⁹⁸ A. Perzanowski, J. Schultz, 2011, pp. 894.; R.A. Reese, 2003, p. 585-594.

acquirer in determining the price may cause for a higher first-sale price to compensate for second market sales taking the place of first sales, but in more likely scenarios it could increase competition between first hand and secondary markets thus leading to an overall decrease of prices, increasing the affordability of literary and artistic works.⁹⁹ Ease of access can also be achieved through the utilization of methods of distribution other than sale, for example through gifting of a work, as distribution of the work is herein after not monopolized by the copyright owner.

Secondary markets also ensure improvement of copyright owners' works/products through greater access to copyrighted works and increase of competition.¹⁰⁰ The principle also provides for cultural preservation and access to controversial works which may not be available on the initial market due to reasons like financial impossibility and political movements or orphan works, any longer.¹⁰¹

Another benefit of the exhaustion principle is that it promotes and protects the privacy of users. Upon the application of the principle, users will be apt to transfer works independent from the permission or knowledge of the owner of the copyright, thus their privacy will be protected. However, privacy of individuals is a risk among others. The data of consumers protected ensure not only privacy but anonymity in instances where there are competitive reverse engineering, product reviews or criminal investigations. In

⁹⁹ S. Reese, 2003, p. 585-592.; R.J. Schmidt, 2019, "Not Your Grandparent's Intellectual Property: How Rightsholders are Using License Agreements to Avoid Exhaustion and Ensure Their Products Stay Out of the Secondary Market", **Saint Louis University Law Journal**, 63, 539.

¹⁰⁰ A. Perzanowski, J. Schultz, 2011, p. 894; A. Perzanowski, J. Schultz, "Legislating Digital Exhaustion". **Berkeley Technology Law Journal**, 2014, p. 1537.

¹⁰¹ A.R. Puig, 2013, p. 160-161; C. Sganga, 2018, p. 2; A. Perzanowski, J. Schultz, 2011, p. 894-895; P. Mezei, 2018, p.13.

an order where the principle of exhaustion is not utilized, consumers would have to disclose each transfer to the copyright owner which would allow the copyright owner to track each transfer and persons involved.¹⁰² Lack of exhaustion would result in copyright owners' right to track and monitor subsequent consumers and the way the works are used, which may lead to the utilization of consumers' data.

The principle provides for the increase of innovation and market competition. Increase in innovation is achieved in three ways: by copyright owners themselves through the incentive to compete with secondary markets, by secondary markets, and by users.

Incentives for copyright owners to innovate stems from their need to differentiate the copies that they provide to the market from the ones in the secondary markets. After the first sale of a work, the work goes into circulation in the secondary market, usually for a lower price than the originals due to wear-and-tear conditions, this gives copyright owners to create new versions to compete with secondary markets.¹⁰³

The works circulating in the secondary market also provide for user innovation. Innovation by secondary markets is the incentive of secondary markets in creating new business models and technologies to cater for thriving secondary markets. Users can easily experiment and produce new works out of a copyrighted work, the users can dispose of the new works with ease as the original copyright owner's distribution right has been exhausted and copyright infringement would not be of question. The principle

¹⁰² A. Perzanowski, J. Schultz, 2011, p. 896.

¹⁰³ *Ibid*, pp. 897-899.

also provides for innovation by users, where first acquirers come up with innovative ways to commercialize their purchases.¹⁰⁴

The principle of exhaustion also promotes competition through secondary markets between platforms by reducing consumer lock-in, which is the instance where consumers choose not to switch between platforms because the costs of switching between platforms is too high. For example, a consumer using the Nintendo Wii game console would not want to switch to the Xbox as their hardware and software are not compatible and would result in high expenses. With the principle of exhaustion, the user would be able to sell their acquired hardware and software and recover a part of their investment thus encouraging them to switch platforms and reducing consumer lock-in. Without the principle of exhaustion, the consumer would need the authorization of Nintendo to sell.¹⁰⁵ Although some assert that the principle of exhaustion could be cause of decrease of access and availability of literary and artistic works base on the notion that the principle reduces the incentive for creation and distribution of works, general opinion provides that secondary markets provide incentives to create based on competition between the owners of copyright and secondary markets.¹⁰⁶

¹⁰⁴ A. Perzanowski, J. Schultz, 2011, pp. 897-899.

¹⁰⁵ *Ibid*, p. 900.

¹⁰⁶ A. Perzanowski, J. Schultz, 2011, p. 894-895; S. Reese, 2003, p. 587.

4. Legislative Background

The principle of exhaustion is provided for in national, regional and international legislation. The codification of the principle in international and regional instruments provides for a mostly uniform system of the principle in most jurisdictions.

An international instrument where the exhaustion principle is recognised is the TRIPS Agreement governed by World Trade Organization (“WTO”). Article 6 provides that *“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.”*¹⁰⁷ The WCT also recognised exhaustion, ruling for contracting states’ freedom to adopt an exhaustion principle.¹⁰⁸

Regional instruments in the EU on intellectual property and copyright also administer the exhaustion principle and its applicability. The harmonization of national legislation is sought to be achieved through the implementation and adoption into national law of the legislation of the EU. Before legislation facilitating the harmonization of the right of distribution or the exhaustion principle was adopted, the results attained by the application of the exhaustion principle were reached by the CJEU through the evaluation of the context of free movement of goods, prohibition of partitioning of the market, and the prohibition of distortions of competition in the mutual market.¹⁰⁹ The ruling of the

¹⁰⁷ TRIPS Agreement, Art. 6.

¹⁰⁸ WCT, Art. 6.

¹⁰⁹ see *Deutsche Grammophon* ; S. Ghosh, I. Calboli, **Exhausting Intellectual Property Rights: A Comparative Law and Policy Analysis**, Cambridge, 2018, pp. 119-120; P. Mezei, “Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment”, *JIPITEC*, 2015, p. 27.

CJEU was first codified in 1991 with Council Directive 91/250/EEC on the legal protection of computer programs¹¹⁰, specifically for computer programs. This legislation was followed by the acceptance of exhaustion to distribution rights of owners of related rights and database authors. The harmonization of the general distribution right and exhaustion pertaining to it, covering all subject matter under copyright protection, was later enacted through the InfoSoc Directive in 2001 with the provision stating: “*The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.*”¹¹¹

The principle of exhaustion is applicable, per the InfoSoc Directive, solely to tangible copies of work, with the InfoSoc Directive clearly stating that services and online services in particular are expressly excluded from the applicability of the exhaustion principle.¹¹²

Turkish Law provides for the principle with the provision: “*The author has the exclusive right to import copies of a work that have been reproduced abroad with his permission and to exploit such works by distribution. Copies that are reproduced abroad may not under any circumstances be imported without the permission of the author and/or the holder of the right of distribution who has the author’s permission. Provided that the authorities of rental and public lending remain with the author, the resale of specific*

¹¹⁰ Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), Article 4(c): “*the first sale in the Community of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*”, later amended by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

¹¹¹ InfoSoc Directive, Art. 4(2); M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 724.

¹¹² InfoSoc Directive, Recitals 28-29.

*copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the rightholder shall not infringe the right of distribution granted to the author...*¹¹³ The Turkish Law facilitates the restriction of the exclusive distribution right with the exhaustion principle.

Meanwhile in the US, the doctrine of first-sale is mentioned in the USCA as: *“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.”*¹¹⁴ Similarly to the legislation of other jurisdictions, the USCA recognizes the principle as a limitation on the right of distribution.¹¹⁵

The first instance of the principle of exhaustion in the U.S., which caused codification of the principle, occurred in 1908 with the U.S. Supreme Court verdict *Bobbs-Merrill Co. v. Strauss*, where it was concluded that an acquirer was eligible to resell the specific (or copy of) work that they had obtained.¹¹⁶ The principle was codified following the decision, in the Copyright Act of 1909 with the rule stating that *“the owner of a particular*

¹¹³ Law of Literary and Artistic Works, Art. 23.

¹¹⁴ 17 USCA §109(a)

¹¹⁵ 17 USCA §106(3); L. Determann, 2018, “Digital Exhaustion: New Law From The Old World”, **Berkeley Technology Law Journal**, p. 183.

¹¹⁶ *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339, 350. (1908); *Bobbs-Merrill Co.*, a publishing company printed a minimum price notice on each copy of a novel that it printed and the defendants sold copies of the novel at a lower price. *Bobbs-Merrill* filed a lawsuit on the basis of copyright infringement claiming that the defendants were violating their “sole right and liberty of venting” the novel. The Court concluded that “the purchaser of a book, once sold by the authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

*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.”*¹¹⁷

Legislation of the different jurisdictions mentioned above are comprised of the same elements as to the requisites of the exhaustion principle's applicability. Relevant legislation requires that the copyright owner permit the first distribution of the work or copies, that the distribution is lawful and that it constitutes transfer of property of the specific (or copy of) work.

5. Requirements of the Exhaustion Principle

All of the legal instruments specified above require, as grounds for the exhaustion principle that the owner of copyright consent to the first distribution of the work or copies, that this distribution is lawful, that the distribution constitutes transfer of property of the copy of the work. Given that these criteria are met, all of the instruments specified above provide that the lawful owner can then make use of the copy as they wish without the permission of the original copyright owner.

The first criterion to be met for there to be a question of the existence of the exhaustion principle is labelled the doctrine of consent, which requires that the first transaction, or

¹¹⁷ 17 USCA §109: The principle of exhaustion was also upheld for “(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or (ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.” ; A. Perzanowski, J. Schultz, 2018, p. 73-75; D.A. Richl, J. Kassim, 2014, "Is Buying Digital Content Just Renting for Life: Contemplating a Digital First-sale Doctrine", **William Mitchell Law Review**, p. 787; L. Determann, 2018, p. 183; A. Pope, 2011, p. 209;

the first sale, of the work subject to copyright on which the right to distribute will be exhausted, be made by or with the permission of the owner of copyright.¹¹⁸ The doctrine of consent specifies that the first distribution be made with the permission of the copyright owner, which would ensure that they would be eligible to request appropriate remuneration for the transfer of ownership.¹¹⁹ This doctrine would further indicate that the actual act of the transfer detailed below need not be done by the copyright owner directly, any transfer viable would be basis for exhaustion provided there is authorisation of the owner of copyright.¹²⁰

The other requirements for the exhaustion principle to be applicable is that there be a transfer of property and that this transfer be lawful.¹²¹ This would mean that the principle would not apply to copies of works that are produced/distributed exclusive of a license or pirated/counterfeit copies, nor for works that have been transferred via rental or leasing.¹²²

The last requirement for the applicability of the principle of exhaustion is that there be feasibility for the lawful acquirer to transfer the ownership over the copy originally acquired. This requirement involves that service-type uses are exempt from exhaustion.¹²³ This prerequisite then raises the discussion on whether the principle applies only to works in a tangible medium or to works set in all media. Some jurisdictions have codified that

¹¹⁸ A. Aslan, 2004, p. 207; P. Mezei, 2018, p. 8; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 16.; E. A. Atar, 2017, pp. 119-120.

¹¹⁹ P. Mezei, 2018, p. 8.; E. A. Atar, 2017, p. 119.

¹²⁰ M. Aksu, 2016, p. 5.

¹²¹ P. Mezei, 2018, pp. 8-9; E. A. Atar, 2017, p. 120

¹²² P. Mezei, 2018, p. 9; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 19.; E. A. Atar, 2017, p. 120

¹²³ P. Mezei, 2018, p. 10.

the principle applies only to works set in a tangible medium while others have not. Doctrinal view also differs on this matter as will be discussed below.

6. Geographical Application

The principle is a territorial concept in that the application of it pertains to a specific location.¹²⁴ There are different approaches as to the geographical implementation of the principle. These include international, regional and national exhaustion. Different jurisdictions have adopted different approaches, with some have adopting ‘international exhaustion’ and choosing to recognise that exhaustion occurs when the first sale of a work occurs outside of its own borders therefore in the event of a sale outside of the borders of a country, the owner of copyright may not oppose the import of the specific (copy of) work into said country.¹²⁵ This importation of said work is referred to as “parallel importation”, with the work itself being labelled a “parallel import”. On the other hand, some have decided to adopt “national exhaustion” where exhaustion occurs only with the first sale of work inside the borders of a country. Another, less adopted form of the principle is “regional exhaustion” where the right of the owner of copyright to control the said work is applicable only up to the moment when it is first sold in a country in the specific region.¹²⁶

¹²⁴ P.S. Morris, 2013, p. 114.

¹²⁵ P.S. Morris, 2013, p. 114.; A. Pope, 2011, p. 207

¹²⁶ UNCTAD-ICTSD, pp. 93-94; P. Mezei, 2018, p. 10; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p.16-17; A. Pope, 2011, p. 207; P.S. Morris, 2013, p. 114.

Explicit legislation on the geographical applicability of the principle of exhaustion may be granted by jurisdictions. One of these is Turkey where legislation explicitly adopts national exhaustion. Turkish Law states that “*the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the rightholder shall not infringe the right of distribution granted to the author*” The legislation plainly states that exhaustion arises only with the first sale of the work within the country.¹²⁷ However, Turkey has begun to adopt international exhaustion for intellectual property, international exhaustion for copyright is planned with the Draft Law on the Amendment of Law No. 5846 on Intellectual and Artistic Works.¹²⁸ This planned amendment regarding literary and artistic works mirrors that of the recent amendment to industrial property legislation in Turkey, which has extended the exhaustion principle for industrial property to international exhaustion.¹²⁹

Adversely, in the US the geographical applicability of the principle is not expressly provided for in legislation. Although it was not clear from initial codifications in the US, whether the principle adopted was that of “international exhaustion” or “national exhaustion”, the US Supreme Court in its *Kirtsaeng* decision in 2013 ruled that “international exhaustion” was applicable.¹³⁰

¹²⁷ Article 23 Turkish Law of Literary and Artistic Works; S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, pp. 18-19.; E. A. Atar, 2017, p. 120.

¹²⁸ for the draft see <https://www.ratem.org/fsek-kanun-taslagi>

¹²⁹ Law No. 6769 of December 22, 2016, on Industrial Property, Art. 152; F. Özer, **Sınai Mülkiyet Kanunu Neler Getirdi?**, Ankara, 2017, p. 25.

¹³⁰ A. Aslan, 2004, p. 145; S. Ghosh, I. Calboli, 2018, p. 117; D.A. Riehl, J. Kassim, 2014, p. 786.

While the US adopts “international exhaustion”, the “regional exhaustion” principle is utilized in the EU.¹³¹ The exhaustion principle was first applied by the CJEU in the ruling of *Deutsche Grammophon* in 1968,¹³² then was codified in order to achieve legal harmonization within the European Union with the InfoSoc Directive, which states: “*The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.*”¹³³ Like Turkish and US Laws, EU Law also extends this principle to the distribution right of related rights owners with Article 9(2) of the Rental Directive.

¹³¹ L. Oprysk, 2020, pp.164-165.; A. Pope, 2011, p. 216

¹³² S. Ghosh, I. Calboli, 2018, pp. 119-120.

¹³³ InfoSoc Directive, Art. 4(2); M. Vittoria, H.I.L. Laddie, P. Prescott, 2011, p. 724.

§ CHAPTER II

DIGITAL EXHAUSTION OF COPYRIGHT

I. Definition and Scope of the Principle of Digital Exhaustion

As technology has advanced leading to the emergence of digital technologies and their utilization in everyday life, the exchange of works digitally have become more widespread due mostly to their swift nature. Whereas the distribution of works protected by copyright before the digitalization of everyday transactions was restricted to the transfer of tangible goods, the digitalization of works and transactions has paved the way for the transmission of data to be utilized for distribution of works subject to copyright that are now in digital media. While these digital works included software in the traditional sense, they now include other forms of works subject to copyright, such as films, music and books. The fast and easy access as well as the unlimited online storage, is causing digital transfers to become the norm in transactions.¹³⁴

Digital transfer of works can take place in various different ways. For the sake of this study, the transfer of works aside from a tangible medium they may be fixed in will be considered. For example, the transfer of software independent from the computer that it is installed on or the tangible medium it is set in (e.g. a CD), or digital transfers of work like peer-to-peer (“P2P”) exchanges and downloads, i.e. delivery via data transmission.

¹³⁴ A. Perzanowski, J. Schultz, 2011, p. 890.

With the ease and increase of the distribution of works in digital media through digital transfers, the question of whether the exhaustion principle on the right of distribution of copyright owners on works in digital media, namely a principle of digital exhaustion, was applicable arose.

II. Legal Nature and Classification Dilemmas of Digital File Transfers

Legal systems are not yet competent in all digital fields. Various technological developments have brought about new transactions which do not have a clear connection to their analogue counterparts. One of those transactions is the transfer of files on digital media. Though the transfer of books fixed in tangible media, i.e. a bound copy, is straightforward and clear; the transfer of an e-book is not as obvious. The ways in which the e-book is transferred and what the implications of the transfers are, are not regarded the same by all academics in the field of law. This part of the thesis examines briefly the ways with which digital transfers can be made and the acts with which they associate.

The most traditional way digital files can be transferred is via a fixed medium, i.e. through data carriers such as USBs, or CDs. This transfer can be done by transferring the file with the medium it is fixed in, which is similar to the analogue way a book is transferred, with the carrier that it is set in, and has the same effects. Other ways that the transfers are made lead to the question of the legal character of the transactions: these are transferring files that are fixed in data carriers firstly by separating them from their data carriers, and the transfer of files that are not fixed in data carriers directly by download from the internet.¹³⁵

¹³⁵ M. Aksu, 2016, p. 2

The application of the exhaustion principle is not for files fixed in data carriers as there is an apparent property transfer of a tangible object and thus a distribution; the question of applicability of the principle of exhaustion and whether a digital exhaustion can be formulated or allowed arises from transfers made without a tangible object in circulation as the legal character of these processes are subject to dispute.¹³⁶ This thesis focuses on digital exhaustion's applicability as regards to digital works transferred independently from tangible media.

Traditionally, the exhaustion principle depended on the foundations of the ownership of a work (or a copy of), and while in the material world, the existence of the principle was not questioned fundamentally, the applicability of the principle in digital media has been inquired countless times. An early example took place in 1995 when a presidential task force in the U.S. considered whether a digital transmission of a copyrighted work, for example via email or downloading from a website, would be allowed under the principle of exhaustion and concluded that such transmissions were not under protection granted by Article 109(a) of the USCA.¹³⁷

Before digital transfers, the principle of exhaustion was set on the incidence of the transfer of ownership of a lawfully acquired copy, which posed no debate given that property was solely tangible. However, with the progression of digital transfers, certain facts lead to challenges being faced when it comes to the application of a possible digital exhaustion.

¹³⁶ M. Aksu, 2015, p. 8.

¹³⁷ R.A. Reese, 2003, p. 581.

Firstly, transactions on digital media over digital goods are based upon agreements labelled licenses between copyright holders and consumers. Secondly, as the transmission of digital copies over the internet is not achieved through embodiment in a tangible object, it is unclear whether the act constitutes communication to the public or distribution. Thirdly, technological nature of P2P exchanges, internet transmissions and the use of digital media through hardware mean that copies (reproduction) of the work must be made to transfer the works.

A. The Sale-License Dichotomy

1. Transfer of Ownership: A Key Concept of The Principle of Exhaustion

The principle of exhaustion on the right of distribution is applicable after a transfer of ownership of the copyrighted work that has been distributed.¹³⁸ This notion is codified in different legal instruments.

The WCT refers to exhaustion through the terms “first sale or other transfer of ownership”.¹³⁹ Likewise, in EU member states, where there is an obligation on member states to adopt into national laws the EU directives; adopt Article 4 of the InfoSoc Directive, a provision that implements Article 6 of the WCT which introduced the right of distribution alongside the principle of exhaustion into the international field, and

¹³⁸ C. Sganga, 2018, p. 217.

¹³⁹ WCT, Art. 6(2).

Article 4(2) of the Software Directive, that all base exhaustion on “*the first sale or other transfer of ownership...of that object is made by the rightholder or with his consent.*”¹⁴⁰

In Turkish law, the distribution right and the exhaustion principle are provided for explicitly by Law. The provision, subjects the existence of the exhaustion principle to transfer of ownership: “*Provided that the authorities of rental and public lending remain with the author, the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the rightholder shall not infringe the right of distribution granted to the author.*”¹⁴¹

USCA also explicitly acknowledges the existence of the principle after a lawful transfer of ownership, stating: “*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.... may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage...*”¹⁴²

The principle of exhaustion is a restriction imposed upon a copyright owner’s exclusive right of distribution through the transfer of ownership. Like in the analogue world, the

¹⁴⁰ InfoSoc Directive, Art. 4; WCT, Art. 6.

¹⁴¹ Law of Literary and Artistic Works, Article 23.

¹⁴² 17 USCA § 109(a)

transfer of works via the internet is facilitated through legal contracts. The legal character of the contracts of digital transfers play a key part in the determination of the applicability of a digital exhaustion principle. Thus, for digital exhaustion to be evaluated, the legal character of digital file transfers needs to be examined.

The legal contracts with which facilitation of copyrighted works in digital media are ensured, are often titled as license agreements by right holders.¹⁴³ While direct sales would pose no controversiality to the transfer of ownership criterion and thus the applicability of digital exhaustion, licensing may prove to be debatable in that a license could imply that there is no transfer of ownership and thus no room for exhaustion.¹⁴⁴

2. Differentiating Sales and Licenses

A “sale” is a synallagmatic contract whereby a “thing” is exchanged for a consideration.¹⁴⁵ The exchange includes the transfer of property of the “thing” in question of the sale for a consideration that is usually in the form of currency.¹⁴⁶

¹⁴³ C. Sganga, 2018, p. 217; R.J. Schmidt, 2019, p. 544

¹⁴⁴ C. Sganga, 2018, p. 217.; A. Perzanowski, J. Schultz, 2011, p. 901

¹⁴⁵ N. Kocayusufpaşaoğlu, H. Hatemi, R. Serozan, A. Arpacı, **Borçlar Hukuku Genel Bölüm Birinci Cilt**, İstanbul, 2014, p. 99., M. K. Oğuzman, M. T. Öz, **Borçlar Hukuku Genel Hükümler Cilt-1**, İstanbul, 2013, p. 46., C. Yavuz, **Borçlar Hukuku Dersleri Özel Hükümler**, İstanbul, 2014, p. 25.; F. Eren, **Fikret, Borçlar Hukuku Genel Hükümler**, Ankara, 2012, s. 211.

¹⁴⁶ Determann, L.; A. Fellmeth, “Don't judge sale by its license: Software transfers under the first sale doctrine in the united states and the european community” . **University of San Francisco Law Review**, 2001, p. 8.

Most platforms that facilitate e-book usage are licensing and not selling said works.¹⁴⁷ While ‘sale’¹⁴⁸ comprises the transfer of ownership of property, a ‘licence’¹⁴⁹ only grants certain rights as provided for by the licence contract to the licensee.¹⁵⁰ To the user, the difference between licensing and sales may not always be clear, particularly because there is a transaction involving money and the procurement of a work, and of the wording used by the platforms, with phrases like ‘buy now’ and ‘purchase’.¹⁵¹ While one of the reasons for this is that the acquirer or user is not a legal professional, one of the main factors is because most do not read terms and conditions.¹⁵²

¹⁴⁷ Schmidt, R. J., 2019, p. 544.; For example, the Kindle Store Terms of Use provides that “*Kindle Content is licensed, not sold, to you by the Content Provider*” and that “*Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not attempt to bypass, modify, defeat, or otherwise circumvent any digital rights management system or other content protection or features used as part of the Service.*” see Kindle Store Terms of Use at <https://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> The Apple Media Services Terms and Conditions has a similar approach, stating that “*if you are a customer of Apple Distribution International and you acquire an App or a book, Apple Distribution International is the merchant of record; this means that you acquire the Content from Apple Distribution International, and it is licensed by the App Provider (as defined below) or book publisher.*” and “*If you are a customer of Apple Distribution International, the merchant of record is Apple Distribution International, which means that you acquire a license to use the Content from Apple Distribution International, but the Content is licensed by the Publisher.*” see Apple Media Services Terms and Conditions at <https://www.apple.com/legal/internet-services/itunes/us/terms.html>

¹⁴⁸ Definition: “transfer of something (and title to it) in return for money (or other thing of value) on terms agreed upon between buyer and seller. The price paid may be based on a posted cost, established by negotiation between seller and buyer, or by auction with potential buyers bidding until the highest bid is accepted by the seller or his agent (auctioneer).” at <https://dictionary.law.com/Default.aspx?selected=1878>.

¹⁴⁹ Definition: “a private grant of the right to use some intellectual property such as a patent or musical composition.” at <https://dictionary.law.com/Default.aspx?selected=1156>.

¹⁵⁰ S. Reis, “Toward a “Digital Transfer Doctrine”? The First Sale Doctrine in the Digital Era”, **Northwestern University Law Review**, 2015, p. 182.; Sganga, 2018, p. 12.; M.S. Richardson, “The Monopoly on Digital Distribution”, **Pacific McGeorge Global Business & Development Law**, 2014, 154.

¹⁵¹ S. Reis, 2015, p. 182.; A. Perzanowski, J. Schultz, 2018, p. 809.

¹⁵² A study conducted by Jonathan Obar of York University and Anne Oeldorf-Hirsch of University of Connecticut showcased this situation. The study included the setting up of a fake social networking website which had a terms and services agreement that needed to be agreed to by users before signing up. The terms and services agreement had clauses that stated that users would be giving up their first-born child as payment and that anything that the users shared would be passed along to the NSA. 98% of the participants of the study agreed to the terms and services agreement. *For the study:* J.A. Obar, A. Oeldorf-Hirsch, “The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services”, **TPRC 44: The 44th Research Conference on Communication, Information and Internet Policy**, 2018.

As the transfer of ownership is a crucial part of the principle of exhaustion, one of the main issues to be reconsidered is whether the transfer of digital files, as transmission of data, should be regarded as licenses or sales, and whether these can be resold by end users or digital second hand buyers.¹⁵³ Copyright owners have adopted legal developments on transfer of works to evade digital exhaustion and the sales of digital goods are commonly subject to license agreements.¹⁵⁴ End user license agreements have begun to be adopted to give the users an appearance of ownership but legally define the copies of goods as licenses and not a transfer of ownership.¹⁵⁵

The copyright owners that facilitate the use or transfer of works in the digital media, subject acquirers to limitations like the examples given above. Major book publishers and the music industry utilize Digital Rights Management (DRM), in that sense, as a tool to restrict customers from transferring digital works to others.¹⁵⁶ This provides that the utility of works in digital media are not regarded as sales, and that the license terms are constantly changing. An example

Another study conducted by Aaron Perzanowski and Chris Jay Hoofnagle surveyed nearly 1300 individuals likely to purchase digital books, music and films. A website for the sole use of the experiment was created and the sample group was divided into 4; the first group was given a “Buy Now” button, the second group was given a “License Now” button, the third group was given a “short notice” while the fourth group was presented a “Buy Now” button for the purchase of physical copies. The participants were instructed to use the website as any other online shopping experience. The study found that only 14 of 956 participants reviewed the fine print while the rest was dependent on the arguably misleading wording. Nearly 90% of group presented with the “Buy Now” button for digital goods believed that they had acquired property rights regarding the digital goods, independent of any license terms. *see* A. Perzanowski, J. Schultz, 2018, p. 239-246.

¹⁵³ P. Mezei, 2018, p. 4; C. Sganga, 2018, p. 217.

¹⁵⁴ D.A. Riehl, J. Kassim, p. 808.; A. Perzanowski, J. Schultz, 2011, p. 901; C. Sganga, 2018, p. 217.

¹⁵⁵ B.W. Carver, “Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies”. **Berkeley Technology Law Journal**, 2010, p. 614; Elkin-Koren, N., “Copyright in a Digital Ecosystem: A User Rights Approach. In Okediji,” R. L. (Ed.). **Copyright Law in An Age of Limitations And Exceptions**. New York, NY, 2016, p. 154.

¹⁵⁶ S. Reis, 2015, pp. 181-182.

for these changes took place when Amazon removed George Orwell's 1984 over copyright infringement concerns from the Kindle libraries of users who had 'bought' the book.¹⁵⁷ This right that major platforms hold in making changes greatly limit the use of digital works 'purchased' by users as well as the users' freedom to access and dispose of copyrighted materials.¹⁵⁸ This, then, poses a controversial topic: while copyright law is formulated to allow for the remuneration of copyright owners whilst balancing the benefit of the public, current legislation and courts' lack of address to the topic at hand do not correlate with one another.

That being said, although sale and licences are different subjects of law and can be differentiated between, the nature of digital works makes the difference difficult to comprehend and to rule on. While the principle of exhaustion requires that there be a transfer of property of the good, there can be no literal transfer of a tangible good as regards to digital works. This makes sale and consequently the principle of exhaustion, in a literal sense, of digital works virtually impossible. To differentiate between a sale and a licensing contractual relation, courts and legislators need to bear in mind the length of time that the work is in possession or access of the consumer, whether the economic transactions are a one-time payment or constant, and whether the transaction is conveyed to the user and third parties as a license or a sale in essence.

Once these factors are examined more thoroughly, the fact that a traditional sense of property ownership and sale is insufficient for the current era is apparent. A one-time payment for a digital work that is accessible indefinitely is no different to a one-time

¹⁵⁷ B. Stone, "Amazon Erases Orwell Books From Kindle", The New York Times, 2009. <https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>

¹⁵⁸ N. Elkin-Koren, 2016, pp. 137-140; A. Perzanowski, J. Schultz, 2014, p. 1543.

payment for a tangible work that is accessible indefinitely. The most controversial question here is whether these transactions are sales or licenses, and how they are characterized; in that, is the label ‘license’ sufficient for classification?¹⁵⁹

3. Practice and Court Decisions

The concepts, namely the need for a transfer of ownership and the practical differences between the ways with which transactions are made in terms of works in digital media, to be examined thoroughly, need to be adapted to the new technological order. The CJEU has ruled on the topic in the *UsedSoft* decision¹⁶⁰, pointing out that ‘sale’ is defined as “*an agreement by which a person, in return for payment, transfers to another person his right of ownership in an item of tangible or intangible property belonging to him.*”¹⁶¹

¹⁵⁹ A. Perzanowski, J. Schultz, 2014, p. 1554.

¹⁶⁰ Judgement of 3 July 2012, *UsedSoft GmbH b. Oracle International Corp.*, EU:C:2012:407; *UsedSoft*, was the first decision to be ruled on digital exhaustion. In Germany, Oracle, a software producer, filed a lawsuit against UsedSoft, a seller of used software licenses, on grounds of copyright infringement. UsedSoft’s sales activities included the resale of Oracle’s software that allowed for a licensee to store a copy of the program on their servers to grant a certain number of users to use the program by downloading them individually to their own computers, to third parties as used licenses. The licenses sold by Oracle specified that these licenses were non-transferable and solely for the use of internal business of the buyer. Oracle sued UsedSoft on grounds of breach of its exclusive rights of reproduction and distribution, i.e. for the resale of used software licenses and asserted that the relevant acts were not under the exemptions of German national law implementing Article 5(1) of the Software Directive. The Court granted an injunction against UsedSoft’s activity.

The decision of the court of first instance was appealed to the German Federal Court (the Bundesgerichtshof), which in turn decided to refer three questions on the implementation and interpretation of the Software Directive to the CJEU. The questions referred were on the meaning of ‘lawful acquirer’ per Article 5(1) of the Software Directive, whether the distribution right is exhausted per Article 4(2) of the Software Directive when the first acquirer downloads a copy from the Internet, and if so whether the persons buying the ‘used’ software after the software is deleted from the computer of the previous acquirer become ‘lawful acquirers’ per Article 5(1) of the Software Directive.

¹⁶¹ *UsedSoft*, para. 42.

The CJEU remarked that Articles 4(2) and 5(1) of the Software Directive were to be understood to mean, the resale of a used license that had been downloaded from the copyright owners' website after an original license that was granted to the first acquirer exclusive of a time limit, that pertained to a remuneration of the copyrighted work, could rely on exhaustion and be regarded as lawful acquirers.¹⁶²

The Court decided that, although Oracle claimed that it did not offer a sale of computer programs but end user license agreements, the EULA and download of the computer program needed to be interpreted as a whole.¹⁶³ The CJEU settled that the download of the software and the transfer of it through material media served the same purpose and were no different, that making the copy fully available to a consumer for an unrestricted period in return for consideration intended to remunerate the copyright holder was economically and legally equal to transferring the ownership of the copy itself thus the nature of the transaction was a sale; notwithstanding the instrument through which the copy of the work was transferred to the consumer.¹⁶⁴ The Court adopted a functional and not a literal interpretation of the relevant legislation and issued a decision based on the technological needs of the case. It was recognized by the CJEU that the mere wording of the contractual relations of the owner of copyright and the lawful acquirer could be used to circumvent limitations to copyright and subsequently the rights of users, and that the control of secondary markets and fundamental freedoms of consumers were only needed so far as to provide proper remuneration for copyright owners' works and the question of copyright.¹⁶⁵

¹⁶² *ibid*, para. 88.

¹⁶³ *ibid*, para. 44

¹⁶⁴ *UsedSoft*, para 45-47.

¹⁶⁵ *ibid*, para. 49-63.

Thus, the CJEU made an evaluation on the first requirement of exhaustion, the sale, and concluded that notwithstanding the title of the transaction, the essence could lead to it being classified a sale.

Turkish Courts provided for a similar decision in the verdict of the Court of Cassation of the Republic of Turkey for the 11th Circuit dated 2015.¹⁶⁶ The Court decided that the provision of the license agreement was for competition and secondary market control purposes and had no effect on copyright. It was also decided by the court that the plaintiff's allegations of repetitive use of a single software could not be proven and thus were dismissed. The Court, in summation, ruled that software independent from the medium it was originally sold in could be subject to exhaustion and that license agreement provisions preventing exhaustion were not applicable per copyright.

The holding of the CJEU and the Turkish Court of Cassation for software downloads can also be utilised for other types of digital works. As demonstrated above, legislation governing exhaustion speaks of the transfer of ownership, language similar to the one used in the Software Directive as dictated by the CJEU. This would mean that for the sake of the functionality of the principle of exhaustion, for the existence of the benefits and aims of the principle, the legal interpretation of licenses as transfers of ownership could be adopted to make way for digital exhaustion, and provide digital users with the rights as their analogue user counterparts.

¹⁶⁶ Republic of Turkey, Court of Cassation 11th Circuit, 2014/17376 E. 2015/8772 K. 30.06.2015, upheld by Republic of Turkey, Court of Cassation 11th Circuit, 2015/10625 E. 2016/6707 K. 16.06.2016

B. Distribution v. Communication to the Public

Another question faced within the discussion of the existence of a digital exhaustion principle is whether digital transfers are legally defined as distribution or communicating to the public.¹⁶⁷ This is particularly important as the principle of exhaustion is an exemption to the right of distribution, and is not applicable where an act does not constitute distribution.

1. Differentiating Distribution and Communication to the Public

The right of distribution is a copyright owner's rights in the making available to the public, their works (or authorized copies of) through a transfer of ownership, including sale, or through rental, lease or lending.¹⁶⁸

The right of communication to the public is copyright owners' right of authorising the making available of the work to the public, through transmission by wire or wireless means, and that may be accessed by the public to whom the work is made available from any place at any time they so wish.¹⁶⁹

¹⁶⁷ M. Aksu, 2015, p. 8.

¹⁶⁸ WCT, Art. 6; InfoSoc Directive, Art. 4; Law of Literary and Artistic Works, Art. 23; 17 USCA. § 106(3)

¹⁶⁹ WCT, Art. 8; InfoSoc Directive, Art. 3; Law of Literary and Artistic Works, Art. 25; 17 USCA. § 106(5)

A common view in doctrine on this matter express that the transmission of work through digital media constitutes communication to the public as only copies that are tangible in the strict sense may be distributed.¹⁷⁰ The advocates of this view assert that the online sales of digital works are not dissemination as per the distribution right; and further state that seeing as there is no tangible copy there can be no question of the applicability of the exhaustion principle.¹⁷¹

In contrast, there are also different views that facilitate the applicability of digital exhaustion to intangible works. One of these is the view that although there is a digital transfer or an online transmission, the thing that the transferee receives is a tangible copy, and thus the copyright owner's distribution right should be exhausted.¹⁷² Another view, based primarily on software, states that as the object in which software is embodied is a secondary feature, if the transferrer no longer has access to their copy, exhaustion will have occurred, as the copy has been distributed.¹⁷³ The argument for the exhaustion principle defends that the software and the data carrier to which it is attached are no different to a shopping bag and its contents, and that similarly exhaustion occurs both in terms of programs attached to a data carrier and in the transfer of the program directly to

¹⁷⁰ F. Öztan, 2008, p. 364-374; E. A. Atar, 2017, p. 94; M. Aksu, 2015, p. 4; Ü. Tekinalp, 2012, p. 189.

¹⁷¹ S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, p. 89; M. Aksu, 2015, p. 13, F. Öztan, p. 364; Memiş, p. 112; Aslan, p. 204; Yavuz, T. Alica, F. Merdivan, **Fikir ve Sanat Eserleri Kanunu Yorumu**, Ankara, 2013, pp. 948-964; e. Gökyayla, 2001, p. 172

¹⁷² S. von Lewinski, J. Reinbothe, **The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP**. Oxford, 2015, p. 113.

¹⁷³ Ş. Eroğlu, 2000, **Rekabet Hukukunda Bilgisayar Programlarının Korunması**, p. 105.

the computer of the user save for the need for intermediation of a data carrier as the work is the software itself and not the carrier.¹⁷⁴

In the WCT, which is adopted into national and regional legislation, there is an explicit prohibition on digital exhaustion within the Articles themselves, and the agreed statement regarding Articles 6 and 7 clarify that “copies” and “original and copies” refer only to *“fixed copies that can be put into circulation as tangible objects.”*¹⁷⁵

Likewise, Recitals 28 and 29 of the InfoSoc Directive, which adopts the WCT into EU Law, provide respectively that *“Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community...”*¹⁷⁶ and *“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.”*¹⁷⁷

¹⁷⁴ M. Aksu, 2015, p. 3.

¹⁷⁵ WCT Agreed statement concerning Articles 6 and 7

¹⁷⁶ InfoSoc Directive, Recital 28

¹⁷⁷ InfoSoc Directive, Recital 29

Thus, copyright protection in EU Law contains the command of distribution of the work incorporated in tangible media. The first sale of the original of a work or copies thereof within the Community by the owner of copyright themselves or with their permission exhausts of the right to regulate the resale of the specific object in the Community. The wording of the InfoSoc Directive delivers a comprehensive list of limitations and exceptions that exclusive rights are subject to, this leaves no room to interpret in lieu of a balance of rights. This narrow interpretation of traditional laws could cause rights infringements where technology developments are changing the business models and possibilities.

The CJEU has decided in its verdict in the *UsedSoft* case that the Software Directive, establishes a *lex specialis*¹⁷⁸ in relation to the provisions of the InfoSoc Directive, which means that the provisions of the former take precedence over the provisions of the latter where rules differ. The Software Directive provides that, even if the transfer of works wirelessly via internet could be interpreted as communication to the public as per Article 3(1) of the InfoSoc Directive, “*the first sale...of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy...*”¹⁷⁹

¹⁷⁸ *Lex Specialis* principle is the idea that any special rule derogates from a more general, according to the legal dictum *lex specialis derogat legi generali* (“Special law repeals general laws”). The principle is a positive rule whose existence depends on the preference of the legal authorities. For more see S. Zorzetto, “The *Lex Specialis* Principle and its Uses in Legal Argumentation. An Analytical Inquiry.” **Eunomía. Revista en Cultura de la Legalidad.**, 2013.

¹⁷⁹ Software Directive, Art.4(2).

While under Turkish and US laws, there are no explicit allowances for or a ruling out of digital exhaustion, EU law provides for explicit wording in its directives stating that the distribution occurs only on works that are fixed in tangible media.

2. Practice and Court Decisions

CJEU discussed in the case *UsedSoft*, legal nature of software transfers, and decided that the download of software did not prove to be communicating to the public per EU Directives.¹⁸⁰

The CJEU's findings included that as there was a transfer of ownership, the act that previously constituted communication to the public was amended to an act of distribution, meaning that the principle of exhaustion would be applicable given that the other criteria were met. It was decided that the rules provided in the Software Directive, constituted a *lex specialis* as regards to the rules of the InfoSoc Directive. Meaning that, although the contractual relationship as regards to the case at hand, the act of transferring the software, could be interpreted as an act of communication to the public as per Article 3(1) of the InfoSoc Directive; Article 4(2) of the Software Directive would still facilitate the exhaustion over that specific copy, as a transfer of ownership has ensued paving the way for the acceptance of the existence act of distribution where transfer of software had occurred.¹⁸¹

Another discussion clarified by the CJEU in *UsedSoft* was whether the principle of exhaustion is applicable only for tangible copies, or whether it could be applied as regards to intangible copies of software. CJEU recognized that views disputing the exhaustion of immaterial copies of works refer to the wording of Article 4(2) of the Software Directive,

¹⁸⁰ *UsedSoft*, para. 56-60.

¹⁸¹ *ibid*, para.50-52

recitals 28 and 29, and Article 4 of the InfoSoc Directive, considered alongside Article 8 of the WCT, and the agreed statement concerning Articles 6 and 7 of the WCT.¹⁸² Recital 29 of the InfoSoc Directive and Agreed Statements concerning Articles 6 and 7 both specifically state that the work, over which there will be application of exhaustion, the work needs to be in a material medium, with Recital 29 stressing that “*the question of exhaustion does not arise in the case of services and on-line services in particular.*”

The Court cleared, for this debate, that Article 4(2) of the Software Directive did not explicitly state that a difference as regards to the medium that the work is set in is material, adding that Article 1(2) of the same directive grants protection to any form of a computer program, with recital 7 stating that the Software Directive aims to include computer programs in any form. Thus, the Software Directive, which constitutes a *lex specialis* concerning the InfoSoc Directive, provides the exhaustion principle for both material and immaterial copies of computer programs.¹⁸³

CJEU ruled similarly in its decision of the case of *Art & Allposters International BV v Stichting Pictoright*.¹⁸⁴ Although the case did not include a question of digital exhaustion

¹⁸² *UsedSoft*, para. 53

¹⁸³ *ibid*, para. 56-60.

¹⁸⁴ *Art & Allposters International BV v Stichting Pictoright*, EU:C:2015:27; Allposters is an organization that markets the posters of famous paintings, and among the range of their products were images printed onto canvases. The procedure for printing the posters on canvases called a ‘canvas transfer’, included laminating a specific poster then transferring the image onto a canvas, which meant that the image was no longer available on the original paper referred to as the poster. Pictoright, a copyright collecting society protecting interest of copyright owners affiliated with itself, opposed the sale of the canvas transfers on grounds that the works subject to copyright, i.e. the images in the posters, were being reproduced without the consent of the copyright owners. When Allposters did not respond to Pictorights’ objection, Pictoright sued Allposters before Rechtbank Roermond, but the case was dismissed. Rechtbank Roermond’s decision was appealed by Pictoright and brought before a regional court of appeal which decided that Allposters’ acts constituted publication and thus was infringing the rights of copyright owners. Allposters appealed this decision on grounds that there was exhaustion of the right of distribution as per Article 4(2) of the InfoSoc Directive, when the copyrighted works that are fixed in tangible media are distributed with the consent of the copyright owners. The main question of the dispute of the case was whether the copyright owners of

in the strict sense, the ruling of the CJEU clearly specified that exhaustion pertains strictly to work in a tangible media. The *Allposters* decision clarified that the extent of the principle of exhaustion was not applicable where the physical medium of the work had changed, much like the canvas transfer. The Court followed through with an exact grammatical interpretation of the InfoSoc Directive Article 4 and Recital 28, stating that an ownership transfer, through a first sale or other means, of the specific work is the prerequisite of the principle of exhaustion thus ruling out any possible digital exhaustion.¹⁸⁵

C. Technological Requisite of Transfers: Making Copies

One of the views in favour for a principle of exhaustion for works in digital media, is that the commercialization of works through traditional means, like selling a hard-cover book, should be no different to the commercialization of works in digital media, like the sale of e-books, or their communication or performance to the public. The general difference between these two processes is that while a sale of a hard-cover book consists of a physical transfer of the book, works in digital media are transferred through digital means. These can include exchanges like P2P¹⁸⁶ exchanges, and email exchanges via downloads.¹⁸⁷

the painting who had authorised the reproduction and sale of the paintings on posters could object to posters of their painting transferred to a canvas with the procedure utilized by Allposters.

¹⁸⁵ M. Galič, “The CJEU Allposters Case: Beginning of the End of Digital Exhaustion?”, **European Intellectual Property Review**, 2015, p. 389

¹⁸⁶ Peer-to-peer or P2P is a network where the peers, i.e. computers, are in an interconnected system over the internet. The system allows for file sharing without a central server. *see* <https://techterms.com/definition/p2p>

¹⁸⁷ Download is the process of receiving data over the internet. *see* <https://techterms.com/definition/download>

The procedures associated with the transfer of files on digital media share a common ground: the file transferred is not a literal physical copy of the very same work that the transferrer holds, i.e. it is not the very same file that is being sent. This gives rise to two problems that, given the current legislative system, prevent the possible applicability of digital exhaustion. The first of these is, the transfer of digital files through the Internet require there to be temporary copies, whether it be through temporary copies on RAM¹⁸⁸, or through uploads¹⁸⁹ for the access of others. The second problem that may arise depending on the way that it is evaluated, is that, the copy that is made of the work in question to be sent to the transferee is a copy and not the very same work over which the distribution right has been exhausted.

1. Legislative Background

Unauthorised reproduction of copyrighted works is forbidden expressly in Turkish, U.S. and EU Laws.¹⁹⁰ However, technological necessities may call for temporary reproductions to be made, which causes a problem to end users.

¹⁸⁸ RAM is a hardware component that allows for software to be operated through temporary memory storage. RAM only stores data when the device is on, the data storage is temporary and deleted when the device is turned off. *see* <https://techterms.com/definition/ram>

¹⁸⁹ Upload means sending a file from your computer to another system. *see* <https://techterms.com/definition/upload>.

¹⁹⁰ 17 USCA. § 106(1); Law of Literary and Artistic Works, Art.22.

To ease the use of computer programs without the actions compromising reproduction, the USCA Article 117 was adopted.¹⁹¹ An essential purpose of adoption of this article was to ensure the right of computer program copy owners to use and redistribute said copies. Article 117 provides for the legal protection of processes needed to utilize computer programs that otherwise may constitute infringement of copyright owners' rights. The article provides for rights that implement the exhaustion principle to computer programs, such as the right to make copies or adaptations in order to utilize the computer program within a machine, or for archival purpose.¹⁹²

A similar provision is adopted in Turkish Law, stating that “*The right of reproduction also covers the acts of loading, displaying, running, transmitting and storing a computer program to the extent that such acts require the temporary reproduction of the computer program.*”¹⁹³

In EU Law, a provision regarding temporary reproduction was codified in the InfoSoc Directive stating “1. *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

¹⁹¹ 17 USCA. § 117

¹⁹² 17 USCA. § 117

¹⁹³ Law of Literary and Artistic Works, Art. 22(3)

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.”¹⁹⁴

Although temporary copies and reproductions are allowed for computer programs for the sake of their utilisations, the same provisions are not available for other digital files as of yet. With the grant of the principle, users would be given the rights they are permitted to enjoy with tangible works.

2. The Temporary Copy Dilemma

Digital transfers require there to be a temporary copy that the seller can upload so that it can be downloaded by the new buyer.¹⁹⁵ When the seller deletes the temporary copy, the transaction will have been the same: both will have started with one copy of the work in property of the seller, and both will have ended with one copy of the work in property of the buyer.¹⁹⁶

A just objection to this justification is that the seller may not delete their copy and therefore there will be a reproduction of the work. However, these concerns can be diverted by new development of technology that allows for tracking or making

¹⁹⁴ InfoSoc Directive, Art. 5(1)

¹⁹⁵ M. Aksu, 2015, p. 16-17.

¹⁹⁶ A. Perzanowski, J. Schultz, 2011, p. 938.

unavailable a work that has been transferred to someone else.¹⁹⁷ Kindle uses a similar technology to allow users to lend and borrow books from others, the book is made available to download for the borrower, the lender subsequently becomes unable to read the book whilst it is in the account of the borrower.¹⁹⁸

One of the points as regards to digital transfers being defined as reproduction, that needs to be considered in the legal discussion for digital works, is the legal definition of random-access memory (“RAM”)¹⁹⁹ copies. When a work in the digital medium is used, the work is loaded into the RAM of the device that it is being used on which creates a copy of the original work.²⁰⁰ The argument here would be whether these temporary copies of constituted reproduction of the work.²⁰¹ Although US courts have decided that the act of loading a digital file unto a computer is reproduction, the ‘copy’ created in RAM is not a fixed copy, i.e. it is temporary, so the act does not constitute reproduction.²⁰² Legislation in the EU highlights a similar approach, providing that reproduction is not subject to authorization or a consequence of infringement if it is essential to the use of the work²⁰³; thus RAM copies are permitted and not infringement of the right to reproduction.²⁰⁴

¹⁹⁷ *Ibidem*.

¹⁹⁸ “Lend or Borrow Kindle Books” https://www.amazon.com/gp/help/customer/display.html/ref=hp_rel_topic?ie=UTF8&nodeId=200549320

¹⁹⁹ RAM is a hardware component that allows for software to be operated through temporary memory storage. RAM only stores data when the device is on, the data storage is temporary and deleted when the device is turned off. *see* <https://techterms.com/definition/ram>

²⁰⁰ M. Aksu, 2015, p. 17.; A. Perzanowski, J. Schultz, 2011, p. 902

²⁰¹ A. Perzanowski, J. Schultz, 2011, p. 902.

²⁰² *Mai Systems Corp. V. Peak Computer, Inc.*, 991 F.2d 511, (9th Circuit. 1993).

²⁰³ InfoSoc Directive, Article 5; Software Directive, Article

²⁰⁴ A. Perzanowski, “Fixing RAM Copies”, *Northwestern University Law Review*, 2009, p. 104; A.R. Puig, 2013, p. 164.

Similarly, legislation could allow for the resale of files lawfully acquired over the internet as these may need to involve the creation of a temporary copy of the work.²⁰⁵

US Courts ruled on the temporary copy issue in the decision *ReDigi*²⁰⁶, the first interpretation of exhaustion in digital music files.²⁰⁷ The Court decided that the resales on ReDigi's website were violating Capitol Records' rights of reproduction and distribution.²⁰⁸ Reasoning behind the ruling was that the principle of exhaustion was applicable only to the particular phonorecord of the work attained by the acquirer. The fact that users (acquirers of the work) uploaded the file meant that it was a reproduction of the phonorecord and not a transfer of the particular phonorecord acquired meant that it was not within the extent of the exhaustion principle. The court ruled that "*ReDigi.... is distributing reproductions of the the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users' hard drives. The first sale defence does not cover this any more than it covered the sale of cassette recordings of vinyl records in a bygone era.*"²⁰⁹

²⁰⁵ N. Elkin-Koren, 2016, p. 137.

²⁰⁶ ReDigi, which identified itself as "the world's first and only online marketplace for digital used music", allowed users to upload legally acquired, which they claim were those legally downloaded from iTunes or ReDigi, sound recordings to their websites and resell them. ReDigi claimed that it used a special software to identify the validity of the files and required that the file be uploaded to a Cloud Locker which allowed the users to access their files if they were not resold, and deny access to the user if the files were subject to resale.

²⁰⁷ P.S. Morris, 2013, p. 126

²⁰⁸ *ReDigi*: 651

²⁰⁹ *ReDigi*: 655; The case was appealed by ReDigi, and the Second Circuit Court of Appeals rejected the appeal and concluded in agreement with the district court's ruling that ReDigi's services constituted copyright infringement as they involved unauthorized reproduction of the digital works.

The case was appealed to the Supreme Court where the decision was upheld reiterating Congress' "constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."

The court interpreted the right of reproduction broadly, thus providing for any digital transfer of works to be considered copyright infringements.²¹⁰ Although the court decided per the occurrence that it viewed the upload of the files as reproduction, it also commented on the criteria of medium per the application of the principle of exhaustion, which the court stated is restricted to ‘material items’, but asserted that the applicability of the principle to works in a digital medium could not be addressed by it, as even the Congress hadn’t taken the step to address the problem and thus the court did not have authority over the subject.

3. Reproductions as New Copies of Work

The exhaustion principle pertains to the ownership transfer of a work, in that it is fixed on the transfer of a particular copy, the copyright owners’ right is exhausted only as per the specific copy of the work in question.

When a work is ‘bought’ online, then transferred to a tangible platform, it is not considered the ‘original’ of the work that has been subjected to a first sale as it has been recreated in another platform and is no longer the work transmitted.²¹¹ Consequently, if these acts are considered thus and the principle be interpreted in a strict sense as with analogue transfers of tangible works, the principle of exhaustion will not be applicable for the digital transfer of works, as the principle is a restriction brought solely to the

²¹⁰ N. Elkin-Koren, 2016, p. 137

²¹¹ M. Aksu, 2015, pp. 9-10

exclusive right of distribution for the specific work on which the right is said to be exhausted.²¹²

The CJEU ruled on the media change of works in its case *Allposters*, where, in the case at hand, the images on posters were canvas printed, which included transferring the images on the poster onto the canvas. After the transfer of the image, the posters were left blank, i.e. they no longer existed. The CJEU concluded that the process included an alteration, which meant that there was a new reproduction of the work. The Court's decision mean that multiple copies were not mandatory for there to be reproduction. The fact that the medium of the work changed is sufficient for the process to be characterized as a reproduction. The decision concluded that the key aspect as regards to exhaustion was that there be authorization for 'the' specific work placed onto the market.

The CJEU's founding in *Allposters* included the consideration of Article 4(2) of the InfoSoc Directive, along with the expression of Recital 28 stating: "*Copyright protection under this directive includes the exclusive right to control distribution of the work incorporated in a tangible article...*"²¹³, administering that exhaustion was applicable only to the specific tangible media in which works are fixed; stating that for the case at hand, the change of medium of the work concludes in the creation of a new, different object, even though the image and the ink is the same, the medium has changed and the

²¹² S. Karahan, C. Suluk, T. Saraç, & T. Nal, 2015, pp. 19-20.

²¹³ InfoSoc Directive, Recital 28.

work has been modified, and thus constitutes a new object which means it is a reproduction of the work.²¹⁴

The decision issued by the CJEU was confined to a strict grammatical interpretation of legislation with the objectives provided at the time of their passing in 2001 and earlier. In that sense, there was no substantive examination of the case and implications thereof, providing for a shallow level of examination that bears no benefit to the technological developments in daily life.

III. *Tom Kabinet* Ruling: An End to Digital Exhaustion?

A. Background of the Case

The *Tom Kabinet*²¹⁵ case is the first CJEU case where the applicability of exhaustion to intangible, digital copies was evaluated explicitly, whilst addressing the controversy of distribution or communicating to the public.²¹⁶

Tom Kabinet is an online intermediary for consumer-to-consumer resale of e-books, where the sellers uploaded copies of their e-books onto the platform and offer them for sale, whilst announcing that they have deleted these books from their own devices. The

²¹⁴ Judgement of 22 January 2015, *Art & Allposters International BV v Stichting Pictoright*, EU:C:2015:27

²¹⁵ CJEU, *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV, Tom Kabinet Holding BV, Tom Kabinet Uitgeverij BV*, Case C 263/18

²¹⁶ *Tom Kabinet*, p. 175.

e-books are watermarked and validated by the platform for the prevention of multiple sales.

The transaction in question of the case included that the buyers could download the e-book from the account of the seller on the Tom Kabinet platform, and the e-books in question would in turn be removed from the seller's account. NUV and GPD²¹⁷ filed a lawsuit against Tom Kabinet on terms of unlicensed acts of communication to the public, applying to obtain an injunction for the halt of operations.

Although the Rechtbank Den Haag, the district court before which the lawsuit was filed, decided in 2017 that Tom Kabinet was not liable for unlicensed acts of communication to the public according to Dutch law implementing Article 3(1) of the InfoSoc Directive, Rechtbank Den Haag provided that it was unclear whether the defendant could base their defence on the digital exhaustion. Four questions were presented to the CJEU for the illumination of the scope of application of digital exhaustion.

The first query of Rechtbank Den Haag on the feasibility of the principle of digital exhaustion was on whether Article 4(1) of the InfoSoc Directive could be interpreted to come to the conclusion of digital file transfers, in particular making available said works remotely by download, for use for an unrestricted period of time, being classified as a distribution. The second question posed was on whether, provided that these digital transfers are regarded distribution, the exhaustion principle would be applicable.

²¹⁷ Dutch Publishers Association (Nederlands Uitgeversverbond-NUV) and the General Publishers Group (Groep Algemene Uitgevers-GAU)

The third question referred to the CJEU was regarding the temporary copy dilemmas of the nature of the transfers. The Rechtbank Den Haag asked the CJEU whether the necessary acts of reproduction in the lawful use of the lawfully acquired copy posed could be regarded as authorized acts of reproduction and the conditions that would need to be applied if such a case were in question. The fourth and last question posed was also regarding the making of necessary reproductions: Rechtbank Den Haag asked whether the Copyright Directive provided for a right of reproduction essential for the transfer of lawfully acquired copies over which the right of distribution has been exhausted, and the terms that would be applicable in such a case.

B. Key Aspects of the Court's Decision

The decision of the CJEU in *Tom Kabinet* was based primarily on a teleological and systematic analysis of applicable law.²¹⁸ The CJEU concluded, in summary, the supply of e-books through online downloads was not a case of distribution in accordance with Article 4 of the InfoSoc Directive, but an act of communication to the public pursuant to Article 3, and thus activities of Tom Kabinet could not be justified under the principle of exhaustion.²¹⁹

The justification of the judgement was grounded on the fact that EU Directives are evaluated and implemented not solely by the wording but also by its context, and the

²¹⁸ P. Mezei, "The Doctrine of Exhaustion in Limbo - Critical Remarks on the CJEU's Tom Kabinet Ruling", *Zeszyty Naukowe Uniwersytetu Jagiellonskiego - Prace z Prawa Własności Intelektualnej (Jagiellonian University Intellectual Property Law Review)*, 2020, p. 6.

²¹⁹ *Tom Kabinet*, para 33-72.

objectives sought after by the rules of which it is part and their backgrounds.²²⁰ In that sense, the CJEU assessed the InfoSoc Directive as a whole, noting that Recital 28 explicitly provides that the right of distribution is applicable to “*works incorporated in a tangible article*”²²¹, while Recital 29 explicitly stating “*the question of exhaustion does not arise in the case of services and online services in particular.*”²²² Furthermore, the CJEU emphasised that the InfoSoc Directive was the transfer and adaptation of WIPO Internet Treaties into EU Law and that per the agreed statements to Articles 6 and 7 of the WCT, copies and originals within the context of the distribution right were “exclusively fixed copies that could be put into circulation as tangible objects.”²²³

The CJEU had previously decided, unlike in *Tom Kabinet*, in support of a principle of digital exhaustion for software in its case *UsedSoft*. The Court differed from its previous decision on the basis that e-books were barred from the scope of the Software Directive with reference to its *Nintendo*²²⁴ decision, stating that even if an e-book would comprise software the program would be incidental in relation to the literary work, and consequently the InfoSoc Directive would be applicable.²²⁵

²²⁰ Ibid. para 38.

²²¹ Recital 28 InfoSoc Directive.

²²² Recital 29 InfoSoc Directive; *Tom Kabinet*. para. 51

²²³ Recital 29 InfoSoc Directive; *Tom Kabinet*. para. 40

²²⁴ In the Case *Nintendo v PC Box*, the CJEU held that the Software Directive is applicable only to software (computer programmes). Where there is a complex matter, where a software also has other elements such as sounds, graphics, i.e. creative elements, the entire work is subject to copyright protection, outside the scope of the Software Directive. *see* Judgement of 23 January 2014 *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl, 9Net Srl*.

²²⁵ *UsedSoft*, para. 54-59.

The CJEU decided on characterisation and prerequisites of communication to the public. The ruling included that for there to be communication to the public, there needs to be a way of individual access of members of the public (unrelated persons), from different places, at different times. It was held that websites such as Tom Kabinet that were publicly available that had members of the public able to access the work at different times from different places meant the work in question should be interpreted as being communicated to the public.²²⁶

The CJEU's decision was concluded on the note that as the conclusion of the first question referred was not in the affirmative, there need not be an answer to the rest of the questions raised.

IV. Reconsideration of the Principle of Digital Exhaustion

A. A Different Perspective to the Key Problems in Applicability

Interactions in everyday life are more digitalised every day. One of the areas where digitalisation has a major role is literary and artistic works in digital media. While consumers are granted the right to the benefits of the principle of exhaustion in cases where tangible copies of works are of question, the same benefits are still not guaranteed for users of digital copies. For example, a user who buys an e-book on a platform such as Kindle would not be able to subsequently sell the e-book without violating the right of

²²⁶ *UsedSoft*, para. 65-69..

reproduction of the owner of the copyright or by selling the Kindle device, which seems a highly unlikely scenario.

The challenges that users face with digital works stem from the fact that legislation adheres to analogue works and legal systems have yet to accept digital media fully as their own. The major challenges faced by digital exhaustion is the legal nature of technological file transfers. Though the transfer of a tangible book is clear, the transfer of an e-book has been, until recently, unacknowledged.

There is also a dichotomy whether these transfers relate to the right of distribution or the right to communicate to the public. While the former is a right that is limited by exhaustion, the latter cannot be exhausted by any transfers of property. Recent case law, and common doctrinal views have decided that a digital transfer constitutes a communication to the public given that the work is made available through a network for recipients to obtain them whenever and wherever they so wish.²²⁷

1. The Sale-License Gulf

The legal concept of transfer of files on digital media that are made between copyright owners and users are not clear, in that they may be sales or licenses, in which case there can be no question of exhaustion as it pertains to the transfer of ownership.²²⁸ With the progression of digital transactions, copyright owners have been implementing license

²²⁷ see *Tom Kabinet*; F. Öztan, 2008, p. 364; M. Aksu, 2015, p. 13; A. Aslan, 2004, p. 204; L. Yavuz, T. Alica, F. Merdivan, 2013, pp. 948-964; e. Gökyayla, 2001, p. 172.

²²⁸ C. Sganga, 2018, p. 217.; A. Perzanowski, J. Schultz, 2011, p. 901

agreements to evade the exhaustion principle.²²⁹ These licenses, known as end user license agreements give an appearance of ownership to the average user but are legally defined licenses and do not constitute a transfer of ownership.²³⁰

There is a need for law makers to decide whether these contracts are to be evaluated as to the soul or as to their titles. Recent case law found EU Courts and Turkish Courts favouring the former, where a “license agreement” was found to be irrelevant given that there was a clear transfer of ownership.²³¹ Both Courts adopted a standard of sale where it was acknowledged as the transfer of ownership of an item regardless of medium, in return for imbursement where the work sold was only able to be utilized by one party of the transaction. The CJEU concluded that the right to use without time limit in exchange for consideration, along with the deletion of the work from the seller’s device, would constitute a sale as well as exhaustion of the distribution right.

CJEU’s functional interpretation of relevant legislation shows that, as well as a need for legislation to be updated, there is a need for the inclusion of technological transactions in the legal system along with their analogue parts, that they are subsequently different ways of the practice of rights of subjects. Even though there is no physical transfer of the work witnessed, it is evident that it is left at the control of the acquirer and no longer with the seller, which proves transfer of property²³².

²²⁹ D.A. Riehl, J. Kassim, p. 808.; A. Perzanowski, J. Schultz, 2011, p. 901; C. Sganga, 2018, p. 217.

²³⁰ B.W. Carver, 2010, p. 614; N. Elkin-Koren, 2016, p. 154.

²³¹ *see UsedSoft* and Republic of Turkey, Republic of Turkey, Court of Cassation 11th Circuit, 2014/17376 E. 2015/8772 K. 30.06.2015, upheld by Republic of Turkey, Court of Cassation 11th Circuit, 2015/10625 E. 2016/6707 K. 16.06.2016

²³² Property is defined through the owner of property in Turkish Law: Turkish Civil Code, Art. 683: “*A person who owns a thing, within the limits of the legal order, has power of using, benefiting and disposing*

However, the CJEU, in *Tom Kabinet*, held that the making available of e-books together with licence agreements and thus is made available to a public that is not yet considered and thus constituted communication to the public. The stance that was adopted for software in *UsedSoft* included a notion that licenses could be transformed into sales if the use of the software was granted to the user for an unlimited time and that was in consideration for the remuneration of the copyright owner, where the seller had no access to the work. The argument for *UsedSoft* could have been utilized for e-books with *Tom Kabinet*, seeing as the online supply of e-books fully meets the doctrinal requirements as discussed by the Court in *UsedSoft*.²³³

The holding of the CJEU and the Turkish Court of Cassation for software downloads can, and should also be utilised for other types of digital works. As demonstrated above, legislation governing exhaustion speaks of ownership transfers similar to the language used in the Software Directive as dictated by the CJEU. This would mean that for the sake of the functionality of the principle of exhaustion, for the existence of the benefits and aims of the principle, the legal interpretation of licenses as transfers of ownership could be adopted to make way for digital exhaustion, and provide digital users with the rights as their analogue user counterparts.

on that thing at his or her discretion.”; A. L. Sirmen, Eşya Hukuku, Ankara, 2014, p. 271.; M. K. Oğuzman, Ö. Seliçi, S. Oktay-Özdemir, p. 272.; “The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter.”: A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier.. (1856) at dictionary.thefreedictionary.com/transfers

²³³ P. Mezei, 2020, p. 14.

2. Distribution v. Communication to the Public: The Tangibility Dilemma

A major setback for digital exhaustion is expressly provided for by EU Law, purely due to legislation wording is the fact that exhaustion is provided for works or copies thereof in tangible media only. Although evidently unsatisfactory, in that there is no uniform application of rights and liabilities on digital counterparts of analogue transaction, the legislation contributing to the tangibility dilemma as regards to discussions on the principle of digital exhaustion have not been subjected to change. In a world where amendments to legislation are made to cater for the needs of scientific and cultural developments, legislating bodies have yet to consider amendments to cater for or rule out the principle.

The wording used by the InfoSoc Directive openly stating that the principle is solely applicable to the distribution of works in material media²³⁴ was naturally adopted by the CJEU in the *Tom Kabinet* decision.

However, an earlier decision of the CJEU, *Vereiniging Openbare Bibliotheken (VOB) v. Stichting Leenrecht*²³⁵, had held that e-books could be subject to distribution through

²³⁴ InfoSoc Directive, Recital 29

²³⁵ In its decision *VOB v. Stichting*, the CJEU held that the lending of e-books were possible in exchange for a remuneration for the copyright owner. The decision held that lending of a digital copy of a book through a server of a public library and allowing a user to reproduce that copy by downloading it onto their computer was possible. CJEU decided that Article 6 of the Rental Directive was applicable on grounds that the digital copy of a book must have been put into circulation by a first sale or other transfer of ownership by the copyright owner or with their consent, to satisfy the requisites of InfoSoc Directive Article 4(2), thus accepting that the sale and transfer of books on digital media constituted an act of distribution.

lending. A point of the Court was that an objective of the Rental Directive was that copyright had to adapt to new economic advances.²³⁶

Although the facts and the end question of the two cases were different, the way with which the cases were evaluated seem to differ. The right of distribution can be exercised via a transfer of ownership or a transfer of the right to use the said object, like rental or lending. While in *Tom Kabinet* the CJEU held that the tangibility of the books in question were to be evaluated with strict adherence to EU legislation, in *VOB v. Stichting* a more functional and up-to-date approach was adopted. If the obstacle before the principle of digital exhaustion is a matter of legal character of the transfer and the right to own-right to use dichotomy would not even be considered before distribution had been established, as the CJEU decided in *Tom Kabinet*, the approach in *VOB v. Stichting* could have been adopted. Given that the CJEU had previously decided pro-technological developments. The expectation of a similar approach for the principle of digital exhaustion would not be out of the ordinary.

3. Technological Blip: The Reproduction Predicament

A challenge in the face of digital exhaustion relating to necessary technological is the fact that the transfer of digital works could constitute copyright infringement. Digital exchanges like P2P exchanges or downloads require that a temporary copy be made before the transfer of the copy in question. US Law found that these copies were

²³⁶ *VOB v. Stichting*, para. 45.

infringing copyright owners' exclusive rights to reproduction and concluded that there could be no digital exhaustion in that sense.²³⁷ While legislation provides for temporary copies of software to be made for their utilisation, the same freedom has not been granted for the transfer of works in digital media as of yet.

Another problem facing digital exhaustion is that the temporary copies that are made and transferred can be viewed as a new copy and thus exhaustion would not be applicable in that there would be no specific copy over which a transfer of ownership had been made. This evaluation can be ratified by CJEU's *Allposters* decision where the transfer of a work from one medium to another was deemed a reproduction and not a distribution.

Adversely, in the case *VOB v Stichting*, where the CJEU decided on the public lending right of e-books, the CJEU allowed for 2 temporary reproductions, for the upload of e-books onto a server and the download onto the transferees own device.²³⁸

Literal interpretations of legislation prove to be infringing as there is no way of having a literal copy of digital work as it is against the nature of digital files. Current legislation should be adapted to the technological necessities, just as with the exceptions made for software and to the lending of e-books, to ensure that glitches do not cause further rights infringements.

²³⁷ see *ReDigi*

²³⁸ Z. Özkan, 2017, p. 40.

B. The Need for the Principle of Digital Exhaustion

The digitalization of traditionally analogue everyday transaction fuels the necessity of a possible digital exhaustion principle.²³⁹ Copyright owners have more command over the availability and pricing of their works as well as consumers' usage of their works in digital media. The control that is given to copyright owners on digital works prevents the utilization of secondary markets, invades privacy, and greatly limits innovation opportunities, and by increase of transaction costs, limits competition and market efficiency.²⁴⁰ Given that the principle of digital exhaustion were to be permissible, it would aid in ease of access, conservation of access to works that are not available to the public anymore, protection of consumer privacy, market efficiency and transactional clarity, an increase in innovation and platform competition.²⁴¹

The major disadvantage of digital exhaustion is the lack of difference between works in secondary and primary markets. Secondary markets and their attributions, which are the principal effect of the principle of exhaustion will inevitably differ for physical and digital goods. Primary and secondary markets for tangible products are dissimilar, owing to the vulnerability of tangible goods. A book on the primary market is new while a copy of the same book on the secondary market is not in peak condition and has been subjected to wear-and-tear. Inversely, an e-book on the secondary market is the same as the copy of

²³⁹ The term "digital exhaustion" was first used by Aaron Perzanowski and Jason Schultz in 2011 to express the application of the principle of exhaustion to the exclusive right of distribution regarding works or copies thereof subject to copyright, in digital media.; A. Perzanowski, J. Schultz, 2014, p. 1539.

²⁴⁰ A. Perzanowski, J. Schultz, 2011, p. 891.

²⁴¹ A. Perzanowski, J. Schultz, 2011, pp. 893-901. A. Perzanowski, J. Schultz, 2018, p. 75-76.

on the primary market as intangible property is not exposed to degradation.²⁴² In that sense, there is no incentive for users to prefer a primary market over a secondary market, signifying that there is no incentive for consumers to prefer the primary market and thus copyright owners' remuneration will not be attained.

Although the indifference of quality of work in primary and secondary markets proves to be a disadvantage in terms of the copyright owners' economic benefits, some benefits of a secondary market through exhaustion apply for secondary markets formed as a result of digital exhaustion. There may still be ease of access as secondary due to the decrease in price and increase in availability.²⁴³ Determination of price by secondary market sellers could result in increase of competition and a decrease in sales for both markets, as there will be no difference due to lack of wear-and-tear, and thus no incentive for consumers to pay higher prices for primary market sales. In instances where the increase in competition leads to decrease in prices, increasing the affordability of literary and artistic works.²⁴⁴ of wear-and-tear, and thus no incentive for consumers to pay higher prices for primary market sales. In instances where the increase in competition leads to decrease in prices, increasing the affordability of literary and artistic works. Ease of access can also be achieved through other transfers of ownership like gifting of a work, as distribution of the work is no longer dominated by the copyright owner.

As has been commented by the CJEU, there is also an economic functionality of the exhaustion principle on digital goods. The *Tom Kabinet* decision read that the supply of

²⁴² M. Aksu, 2015, p. 17; C. Sganga, 2018, p. 212.

²⁴³ A. Perzanowski, J. Schultz, 2011, pp. 894.; S. Reese, 2003, p. 585-594.

²⁴⁴ S. Reese, 2003, p. 585-592.; R.J. Schmidt, 2019, P. 539.

books on tangible media and the supply of e-books could not be considered the same from an economic perspective. It was noted that the supply process of an e-books required to additional cost or effort and that used copies of the e-books were indifferent to the first hand e-books, making a digital second-hand market feasible to affecting the interests of owners of copyright in obtaining a suitable remuneration for their works.²⁴⁵

Digitalisation of our daily activities also results in the digitalisation of literary and artistic works. Although previously these works were created and fixed in a tangible medium, technological developments could mean there to be works that are not fixed in tangible media. In case like these, the application of digital exhaustion would mean that there be a chance for works that are only fixed in digital media to be available in secondary markets even though they may no longer be available on primary markets due to reasons like financial impossibility and political movements, orphan works or physical impossibilities like the physical destruction of works, thus proving that digital exhaustion provides for cultural conservation and access to controversial works that may no longer be available for various reasons.

Digital exhaustion would further improve market competition and increase innovation through this competition. The incentive for copyright owners to innovate stems from their need to differentiate the copies that they provide to the market from the ones in the secondary markets. As there are no differences between works in primary markets and secondary markets for works in digital media, owners of copyright would have more incentive to create new versions to compete with secondary markets.

²⁴⁵ *Tom Kabinet*, para 58

The benefit of increase of competition between platforms would be greatly improved by a digital exhaustion principle. As with digitalisation, the utilization of technological devices is more widespread, meaning people are more equipped with software for the devices that they use. Provided that digital exhaustion is applicable, consumer lock-in would greatly decrease due to the freedom of users to sell their copies of works, thus encouraging them to switch platforms and reducing consumer lock-in, increasing market competition.

Aside from the aforementioned reasons for a need of a digital exhaustion principle, lies a fundamental rationale. The laws that have been governing human transactions are overlooking the fact that digital counterparts of previously analogue transactions pose no difference to the average man. In that sense, the unavailability of the same, if not similar, provisions may pose additional right infringements that need to be catered to.

CONCLUSION

Copyright, which is an intellectual property right, seeks to give incentives for the remuneration of cultural work creators to create more, and the public to use these literary and artistic works. Copyright is vital in that it ensures the development of the creation process. Copyright grants protection to literary and artistic works that bear originality and characteristics of the creator. Certain rights are given to the owners of copyrighted works that meet these requirements. To balance public interest and the interests of the owners of copyright, these rights entrusted to copyright owners are subject to limitations and exceptions, one of these is the exhaustion principle that the exclusive right of distribution is subjected to.

The right of distribution is one of the exclusive economic rights permitted to copyright owners. The right gives that the right owners the ability to launch copies of the copyright protected work into circulation in the relative market and consequently the right to exclude third parties from carrying out said operations; which ensures that the copyright owner can exploit their works financially. The principle of exhaustion limits this right: when the owner of a copyright owner sells and/or obtains an economic reward from the first sale, or transfers the ownership in any other way of a copyrighted work or copies thereof to a third party, the right to control that specific work is exhausted and the buyer is then able to make use of the specific work in any way they may wish.

The principle is provided for in various international, national and regional legislation. The principle is recognized in, inter alia, the TRIPS Agreement, Software and InfoSoc

Directives of the EU, and national legislations of Turkey and the US. The requirements for the applicability of the principle is largely the same in all of the jurisdictions: it is required that the owner of copyright approve the first distribution of the work (or copies), that this distribution is lawful, that the distribution constitutes transfer of property of the copyrighted work (or the specific copy). The lawful acquirer of a work over which these prerequisites are satisfied can dispose of the work or copies thereof in any way they so wish.

A variation in the application of the principle for different jurisdictions arises in the geographical application of the principle. There are different approaches as to the geographical implementation of the principle: international, regional and national exhaustion. Some jurisdictions, like Turkey, choose to adopt national exhaustion which means that the right is exhausted only with the first sale of the work or a specific copy within the borders of a country. Others, like member states of the EU, adopt regional exhaustion where exhaustion is applicable only up to the moment when it is first sold in a country in the specific region. An example for a jurisdiction where international exhaustion is applicable is within the US, where copyright exhaustion occurs when the first sale of a work occurs outside of its own borders.

The main objectives of the principle of exhaustion is to ensure that there is a balance concerning the exclusive rights of owners of copyright and the property rights of persons who have physical control over the work or a specific copy thereof. To accommodate the objectives of copyright, three main theories have been formed. First of which is the reward theory, which states that the copyright owner is free to set the initial fee of purchase thus remunerating their works. The second theory, the full ownership theory, is

grounded on the common acknowledgement of the precedence of property rights over copyright. As per this theory, the individual who has command over the copy or the original of the work, the one with the ownership of property, should dispose of it as they so wish. The third and most recent theory is the market and legal certainty theory which bases the existence of the principle on the fact that the limitation over an exclusive right to distribute facilitates legal certainty and free market.

The subjection of the distribution right to the principle of exhaustion is due to the benefits that it has on markets, legal systems and the general public; most of which are secured through the establishment of a secondary market. The principle provides for ease of access, conservation of access to works that are not available to the public anymore, protection of consumer privacy, market efficiency and transactional clarity, an increase in innovation and platform competition.

Digital exhaustion, a term first used by Perzanowski and Schultz in 2011, refers to the application of the exhaustion principle on the right of distribution on works subject to copyright in a digital medium. The principle has received attention as the transmission of works in digital media have become widespread and an everyday affair. The transmission of works in digital media can take place in various different ways. The transfer of digital files independent from a tangible medium is one of the focus points of the key aspects of the principle of digital exhaustion analysed in this thesis. While the relevant legislation and legal customs for works in tangible and analogue media are clear, there is a need for the revision of these for the technological developments that have changed everyday transactions. Traditionally, the exhaustion principle depended on the foundations of the ownership of a copy of a work and while in the material world, the existence of the

principle was not questioned fundamentally, the applicability of it in the digital medium has been inquired countless times. While users are granted the right to the benefits that exhaustion brings in cases where tangible copies of works are of question, the same benefits are not guaranteed for users where digital copies are concerned.

The legislation of different jurisdictions offers different views on digital exhaustion. While EU Directives explicitly acknowledge the principle for computer programs in any media, and US Law provides limitedly for exhaustion for computer programs that are designed to be used in a limited use device, such as a games computer. Turkish Law does not explicitly accept or deny the existence of a digital exhaustion. Although EU delivers for exhaustion over the distribution right for software, the fate of other digital works is controversial.

Aside from the lack of legislative support, there is also a controversy as to the legal nature and character of digital file transfers that make it difficult to base the principle of exhaustion on. While their analogue counterparts are clear, there are trivial questions regarding digital transfers. The first problem is that, regarding digital files like e-books or music, transactions are built on contracts labelled licenses by copyright owners. Secondly, the transmission of digital copies through a server is not done through embodiment on a tangible object and is thus unclear whether it constitutes distribution or communication to the public. Thirdly, per the technological nature and necessities of transmissions, like P2P exchanges and use of digital files through hardware, mean that there is a compulsory reproduction of the work for its obtainment and use.

The first problem faced by the principle of exhaustion, stems from copyright owners' will to label digital transactions licenses instead of sales. Although it is not always clear from the wording that is visible to the end consumer, e.g. buttons like "buy now", or "purchase" are widely used by platforms to promote the users into believing that the transaction is a sale, the agreements are titled licenses. As the exhaustion principle relies on the transfer of property of the work or copies, a license agreement that only facilitates for the use of the work will make a digital exhaustion inapplicable.

In practice, the CJEU and the Turkish Court of Cassation have both ruled in cases where there was a distribution of software. The CJEU ruled that the essence of the contract was the main point and that the title did not matter; as long as the license provided for a facilitation of use for an unrestricted term in exchange for consideration, and the work was deleted by the initial user, then the license agreement proved a sale and thus there was transfer of ownership giving rise to the applicability of the digital exhaustion principle. The Turkish Court of Cassation ruled that software independent from the medium it was originally sold in could be subject to exhaustion and that license agreement provisions preventing exhaustion were not applicable per copyright, as the license agreement was deemed for competition and secondary market control purposes and had no effect on copyright. The ruling of the Courts mentioned herein show that the transfer of property on digital media is possible given that the use of the specific work in question is exclusively given to the acquirer, with no access by the seller, for an unlimited period of time for consideration.

The second point by which the principle of digital exhaustion is tried is whether digital transfers constitute distribution or communication to the public, which is a key notion as

the principle of exhaustion is an exception of the right of distribution via transfer of ownership and cannot be applied otherwise. Both the WCT and the InfoSoc Directive, which are adopted into national legislation, provide explicitly that works subject to distribution are only those that can be put into circulation as material objects. In that, if a work is not incorporated in a tangible medium, it is not distributed and thus the right of distribution has not been exhausted over it.

The CJEU recognized an exception to the rule of digital transmissions being regarded as communication to the public and ruled, in *UsedSoft* that the Software Directive posed a *lex specialis*, that the first sale of software would exhaust the right of distribution. Other transfers of works in digital media were regarded communication to the public, as demonstrated in the decision of *Tom Kabinet*, as the upload of works onto a platform where users could access them at a time and place they chose proved communication to the public and not distribution.

The CJEU recognized distribution *per se* and not as an exception, in the form of public lending in the case *VOB v Stichting* with the point that copyright had to adapt to new developments. The same novel approach was not adopted in other cases regarding exhaustion.

The third challenge faced by the applicability of digital exhaustion arises from the necessary acts of digital file transfers. While the sale of an ordinary book has the physical transfer of the same book, the sale and transfer of an e-book require that copies of the book be made to upload the book to a server and to download the book to a server, which also means that the e-book transferred is not the very same book in the literal sense.

Although necessary reproduction of works for transmission and transfers is not regarded by legislation; necessary reproduction, like RAM or instalment copies, of software for its use is permitted under Turkish, US and EU Laws.

The issue of the transmitted work not being the very same work was evaluated by US Courts in the *ReDigi* case where the Court decided that, as the transfer of the particular phonorecord in question required that a new copy be made for upload to and download from the server, it ceased being the same phonorecord and was a reproduction. The Court held that, as exhaustion applies over the specific work or copy, there could be no question of exhaustion as the file transferred was a new work.

The CJEU came to a similar decision in *Allposters*, where there was a question of exhaustion over images of posters that had been transferred to canvases, where it held that even though there was only a change in medium of the work, it could not be regarded as the same work, it was a reproduction.

An adverse decision was adopted by the CJEU in *VOB v Stichting*, the judgement where the court decided that copyright had to be open to new developments, where the court recognised that there needed to be two different acts of reproduction, one during upload of the file to server and the other during download of the file from the server to the end users device, and that these reproductions would not be copyright infringement as they posed the natural necessity of digital transactions.

The first decision concluded specifically on digital exhaustion is CJEU's decision on *Tom Kabinet*, the case of a second-hand e-book intermediary. The CJEU observed on the key aspects of the principle of digital exhaustion and ruled on the lack of a single requisite, that transmission of digital files constituted communication to the public and thus there could be no digital exhaustion as there could be no digital distribution.

The CJEU adopted the literal wording of Directives and Recitals that require tangible media for the principle of distribution, with no detail to functionality or technological needs. The decision notes that a way of individual access of unrelated persons at different times from different places to a work is communication to the public. The ruling remarked that a website such as Tom Kabinet, that could be accessed by the public, anywhere and at any time served communication to the public.

As is evident with the court cases mentioned in this thesis, the major challenges faced by digital exhaustion is the legal nature of technological file transfers and the lack of understanding and attention from the legal field. There needs to be a uniform understanding of works in digital media, at present software and other works is a distinction that is adopted by courts. The CJEU, while adopting a functional interpretation of legal interactions for software in the *UsedSoft* case, has adopted a literal interpretation stance for e-books in *Tom Kabinet*.

The lack of legislation and courts' refusal to make functional decisions have meant that the principle of exhaustion and its functions have not been implemented as widespread as prior to technological advancements.

Exceptions to the rights granted by copyright to copyright owners, have been adapted to ensure balance amongst interests of the owners of copyright and the public. In the case of a lack of a digital exhaustion principle, copyright owners have more command over the availability and pricing of their works in a digital medium as well as consumers' usage of their works. The control that is given to copyright owners on digital works prevents the utilization of secondary markets, invades privacy, and greatly limits innovation opportunities. This control, by increase of transaction costs, limits competition and market efficiency. To avoid these, a possible digital exhaustion principle should be applicable as it would aid in ease of access, conservation of access to works that are not available to the public anymore, protection of consumer privacy, market efficiency and transactional clarity, an increase in innovation and platform competition.

The technological developments have led to a change in the way that we live. While during the adoption of current legal instruments, the digital world was not as widespread. This situation leads inevitably to unjust practices where digital transactions are not granted a great freedom as their analogue counterparts. The expectation that technological counterparts of once analogue transactions bear the same consequences will come as no surprise as the situation has not been addressed. It is our belief that these practices need to be addressed by legislating bodies as up to date, courts have refused to take a functional approach to ensure justice, instead opting to practice word for word the legislation even though it adds little to justification and ensuring fair rights.

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ABSTRACT

The subject of this thesis is the applicability of the principle of digital exhaustion. The principle of exhaustion is one of the limitations that the exclusive right of distribution granted to copyright owners is subjected to. The principle attains that once a copyrighted work is sold or the property of it is transferred in another way, by or with the consent of the copyright owner, within the market that is set out by the legislation of each jurisdiction; the copyright owner no longer has control over the work or specific copy over which the right of distribution has been exhausted. The principle of digital exhaustion refers to the exhaustion of the right of distribution to works in digital media that have been transferred through digital means. Although an exhaustion principle is applicable to works fixed in tangible media, the applicability of the principle of exhaustion to digital works is not clear and has been a matter of discussion.

In the first part of this study, the definition and legal character of the principle of exhaustion are examined. In the second part of the study, the principle of digital exhaustion is examined by the examination of challenges in legislation and practice in Turkish, and EU laws.

Keywords: Copyright, Right of Distribution, Exhaustion, Digital Exhaustion, CJEU, Court

ÖZET

Bu tezin konusunu dijital tükenme ilkesinin uygulanabilirliği oluşturmaktadır. Tükenme ilkesi, telif hakkı sahiplerine tanınmış olan yayma hakkına getirilen sınırlamalardan biridir. İlke; yargı alanının mevzuatı tarafından belirlenen coğrafi piyasa içerisinde, hak sahibinin izni ve onayı ile, telif hakkına tabi bir eserin satılması veyahut başka bir yol ile mülkiyetinin devri sonrasında; telif hakkı sahibinin yayma hakkının tükenmesi, söz konusu eser üzerinde denetleme hakkına sahip olmamasını düzenler. Dijital tükenme ilkesi; dijital yollarla aktarılan dijital ortamlardaki eserlerin üzerinde yayma hakkının tükenmesine atfetmektedir. Tükenme ilkesinin uygulama alanı maddi ortamlarda bulunan eserler için geçerli olmasına rağmen, tükenme ilkesinin dijital eserlere uygulanabilirliği açık değildir ve tartışma konusudur.

Bu çalışmanın ilk bölümünde tükenme ilkesinin tanımı ve yasal niteliği incelenmiştir. Çalışmanın ikinci bölümünde, dijital tükenme ilkesi, Türk ve AB yasalarındaki mevzuat ve uygulamadaki zorlukların incelenmesi ile irdelenmiştir.

Anahtar Kelimeler: Telif, Yayma Hakkı, Tükenme, Dijital Tükenme, ABAD, Mahkeme