

# Q 240



# Q240 - Exhaustion issues in copyright law

## Introduction to Working Questions 2014

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- No previous work of AIPPI on exhaustion issues in copyright law

cf. Q205: Exhaustion of IPRs in cases of recycling or repair of goods

Q156: International Exhaustion of Industrial Property Rights

Q146: International Exhaustion of Patent Rights

- No specific rules under TRIPS agreement or WCT

## Article 6 Right of Distribution

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

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

[A copyrighted work in the form of a tangible good]

[First Sale]

- In a tangible world, exhaustion of copyright is a widely accepted principle.

After the first sale of a copyrighted work in the form of a tangible good with the consent of the right owner,

⇒ the distribution right derived from copyright is said to be “exhausted”.

[A copyrighted work in the form of a tangible good]

e. g., CD's, DVD's, CDRoms, etc., could be freely sold without any copyright restriction after the first sale thereof.

- In the US, exhaustion is also called the "First Sale Doctrine".

[A copyrighted work in the form of a tangible good]

For other forms of non-permanent distribution (e. g., lending and renting of copies),  
- exhaustion does not apply in many jurisdictions.

- EU and EEA: only international exhaustion within their respective territories are recognised.
- US: Supreme Court recently allowed international exhaustion also for works first sold outside the United States (Kertsaeng v. John Wile & Sons, Inc. of March 19, 2013 document No. 11/697).
- Japan: The Copyright Act recognises international exhaustion (Article 26bis, Para 2, Item 5).

# [On-line Exhaustion]

- In the digital world, less and less data carriers are used for the distribution of copyrighted works.
- Software, music, films, games or e-books may be downloaded from online-shops for permanent or temporary use.
- One of the issues: is there a sale or a licence?

# [On-line Exhaustion]

- For software copyright, the CJEU decision *UsedSoft v. Oracle* (of July 3, 2012; C-128/11) has recognised exhaustion of copyright for permanent copies downloaded online under certain conditions.
- It is unclear in the EU if this concept also applies to other works such as films, music, games or e-books.

- In *Capitol Records v. ReDigi*, a US district court stated, “The novel question presented in this action is whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine...The Court determines that it cannot.”
  - The sale necessarily involved a violation of the reproduction right to which the First Sale Doctrine is not a defense.
  - The phonorecords were not “lawfully made.”
  - The sales were not of the owner’s “particular copy.”

- Consumer protection groups have been lobbying for a long time to establish exhaustion of downloaded copies for example in the USA. (Slogans like “You bought it, you own it”, for example, by the US electronic Frontier Foundation (EFF) summarise their standpoint.)

## [Possible questions]

- What is the rationale for exhaustion of copyright?
- To which extent should exhaustion apply with respect to:
  - geography (international exhaustion)?
  - types of rights?
  - types of activity by rightholders?
- Is there exhaustion in case of download? licence?

## [Possible questions]

- Are downloaded copies really fully comparable with copies bought on tangible data carriers?
- Should licencees and owners be distinguished? If so, how?
- Can rights be exhausted in a non-perpetual licence?

- Are rights exhausted (especially regarding computer programs, music files, e-books and videos) after the licensor has gone bankrupt?
- How do you guarantee adequate remuneration for the right holders?

- Should "re-sellers" of digital copies be allowed to further re-sell that digital copy under the circumstances described in *Used-Soft v Oracle*?
- Should software and other works (e.g., music files, e-books and videos) be treated differently?
- How about multi-user-licences: are you allowed to split them up and sell them separately?
- Should the distribution of downloadable copyright-protected works be regulated by sales law?