SUMMARY REPORT

Question 240

Exhaustion issues in copyright law

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The purpose of this question is to study international and national law with respect to exhaustion issues in copyright law and to encourage proposals for further harmonisation.

National Groups from the following countries (in alphabetical order) have submitted reports: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Caribbean Regional Group, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Romania, Russia, Singapore, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, Uruguay, the United States and Venezuela. In total, there were 40 reports. Reports received after 30 June 2014 are listed above but their contents are not included in the summary.

Many of the reports provide extensive reviews and very thorough analyses on case law and the interpretation of statutory provisions. Some of the Groups have also given detailed proposals for further harmonisation with respect to exhaustion issues in copyright law.

This report summarises some of the issues discussed in the National Group Reports but does not attempt to fully describe the accounts of the different national laws made by the National Groups. For a detailed account of any particular answer please refer to the respective National Group Report at https://www.aippi.org/?sel=questions&sub=workingcommittees&viewQ=240#240

I. Analysis of current law and case law

Right of distribution

1) Does the copyright law of your country recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT? If so, please cite the provisions which set forth the definition of the right of distribution and recognise such right.

Almost all the reporting Groups (total 36 Groups out of 42 Groups[1] report that they recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT. Most reporting countries have specific provisions for the right of distribution (total 33 Groups out of 36 Groups: Austria, Belgium, Brazil, Bulgaria, Canada, Guatemala, the Dominican Republic, El Salvador, Czech Republic, Denmark, Egypt, Estonia, Finland, Hungary, Japan, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Singapore, Sweden, Switzerland, Turkey, the UK, Ukraine, Uruguay, the US and Venezuela). Other reporting countries have general provisions which can be considered to provide for the right of distribution (3 Groups: Argentina, Australia and France).

[1] The Caribbean Regional Group includes Guatemala, the Dominican Republic and El Salvador but in "I. Analysis of current law and case law", each of the three countries is counted as a separate Group.

Exhaustion of copyright-protected works

2) Does the copyright law of your country recognise the exhaustion of copyright-protected works after the first sale of the work with the authorisation of the author? Is it recognised by statutory law or case law?

The vast majority of the reporting Groups reports that their copyright laws recognise the exhaustion of copyright after the first sale of the work with the authorisation of the author (34 Groups: Argentina, Austria, Belgium, Canada, Guatemala, El Salvador, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Romania, Singapore, Sweden, Switzerland, Turkey, the UK, Ukraine, Uruguay, the US and Venezuela). Also in Australia, the lawful purchaser can generally resell the goods without infringing the copyrights.

In most reporting countries, exhaustion is provided by statutory law (33 Groups: Austria, Belgium, Bulgaria, Canada, Guatemala, El Salvador, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Romania, Singapore, Sweden, Switzerland, Turkey, the UK, Ukraine, the US and Venezuela). Many EU countries report that EU-wide exhaustion is also recognised by statutory laws (14 Groups: Bulgaria, Belgium, Czech Republic, Denmark, Estonia, France, Hungary, Italy, Latvia, the Netherlands, Norway, Portugal, Sweden and the UK). In Austria, EU-wide exhaustion is recognised by case law.

In some reporting countries, it is a generally accepted principle (Argentina) or a provision which does not specifically provide for national exhaustion is interpreted so as to provide for national exhaustion (2 Groups: Australia and Uruguay).

In Brazil, copyright law is not clear about exhaustion of rights.

One reporting country does not recognise the exhaustion (the Dominican Republic).

3) How does your law treat exhaustion of copyright-protected works? Specifically,

a) Does exhaustion of rights occur for all kinds of works or is exhaustion limited to certain kinds of works?

In most reporting countries, exhaustion of rights essentially occurs for all kinds of works in the case of a transfer of copies of the work in a tangible form (28 Groups: Belgium, Bulgaria, Canada, Guatemala, El Salvador, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, the Netherlands, Norway, Peru, the Philippines, Republic of Korea, Romania, Singapore, Sweden, Switzerland, Turkey, the UK, Uruguay, the US and Venezuela), with some exceptions in some reporting countries (4 Groups: Australia, Austria, Mexico and Portugal (videograms and phonograms)).

b) Which right can be exhausted?
Is it (a) the right of distribution, and/or (b) the right of reproduction, and/or (c) the right of lending and/or renting of copies?

In most reporting countries, only (a) the right of distribution is exhausted in principle, while neither (b) the right of reproduction nor (c) the right of lending and/or renting of copies is exhausted (29 Groups: Austria, Belgium, Bulgaria, Canada, Guatemala, El Salvador, Czech Republic, Denmark, Estonia Finland, France, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, Paraguay, Peru, the Philippines, Portugal, Romania, Singapore, Sweden, Turkey, the UK, Ukraine, Uruguay and the US). The consequences seem to be basically the same in Australia. The Mexican Group reports that in the case of software, there is an exception when the copyright holder keeps the right to authorise or prohibit the distribution and rental of the copies.

In Republic of Korea, (a) the right of distribution and (c) the right of lending and/or renting of copies are exhausted with some exceptions while (b) the right of reproduction is not exhausted.

In Switzerland, if the copy of a work was transferred once, that copy may not only be transferred again, but also otherwise distributed, i.e., it may also be exhibited, lent out, or rented, since the CA does not grant the author an exclusive right of distribution, lending or renting, whereby the copy may be rented out by any owner of that copy only against payment of compensation to the original rightholder.

In Sweden, the right to publicly display the work can be also exhausted.

Pursuant to Norwegian law, the right of distribution can be exhausted while the right of reproduction cannot. Pursuant to the Norwegian Copyright Act, there is a line of demarcation between renting (whereby the lessee pays consideration) and lending (whereby the lessee does not pay any consideration). The right of renting copies is not exhausted except in respect of buildings and works of applied art. The right of lending is, on the other hand, exhausted except with respect to machine-readable copies of computer programs. In the case of the lending of work where the rights are exhausted the right holders are compensated through a collective arrangement.

In the US, in certain circumstances, lending or renting copies of phonorecords and software is an exemption to the first sale doctrine.

In Venezuela, it seems that (a) the right of distribution and (c) the lending of copies can be exhausted.

In Brazil, it seems that all of these rights can basically be exhausted.

c) What are the requirements for exhaustion of rights to occur? What activities by rightholders are required for exhaustion to apply? Are licencees/buyers required to take any positive steps for exhaustion to be applicable?

Most reporting Groups report that the requirement for exhaustion of rights is (1) putting into circulation, or a sale or other transfer of copies in a country or the European Economic Area in the case of EU countries (2) with authorisation of the copyright holder (33 Groups: Austria, Belgium, Bulgaria, Canada, Guatemala, El Salvador, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, the Republic of Korea, Romania, Singapore, Sweden, Switzerland, Turkey, the UK, Ukraine and the US). Buyers are not required to take any steps for exhaustion to be applicable in such countries/regions. The situation in Australia seems to be more or less the same. The French Group notes that the copies must be tangible (except in the case of computer programs).

The US Group reports that the elements of the first sale doctrine includes (1) the copy was lawfully made with the authorisation of the copyright owner; (2) ownership of the copy was initially transferred under the copyright owner's authority; (3) the defendant is a lawful owner of the copy in question; (4) the defendant's use implicates the distribution right only, not the reproduction or some other right given to the copyright owner; and (5) the sale or other disposition of the owner's copy is of the owner's "particular" copy.

d) If the rightholder A distributes lawful copies made by A to people including B, B purchases a copy from A and sells it to C, and thereafter A cancels the sales agreement between A and B because of non-payment of the price by B to A, may A assert his/her copyright against C? May C rely on exhaustion of A´s rights to the work (or the right of distribution)? In this connection, which party (A or C) will keep the right of ownership in the tangible copy?

It seems that in most reporting countries/regions, C may rely on exhaustion of A's right of distribution. Also, C will keep the right of ownership/title to the tangible copy although there may be no specific statutory law or case law for this fact pattern (24 Groups: Belgium, Bulgaria, Canada, El Salvador, China, Denmark, Finland, France, Hungary, Italy, Latvia, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Romania, Sweden, Switzerland, Turkey and Venezuela). Some Groups point out that once the exhaustion is established, the later cancellation will not have any effect on the exhaustion (5 Groups: Belgium, China, Denmark, Switzerland and Turkey). Some Groups point out that C is a bona fide purchaser that should be protected (4 Groups: Egypt, Latvia, Romania and Switzerland). The Singaporean Group points out that C may rely on exhaustion, but is silent on the issue of right of ownership/title. The Australian Group notes that the outcome is more or less the same unless there is a contractual provision about the reservation of title as explained below.

In this connection, the French Group points out as follows:

- since A consented to a sale, the subsequent cancellation of said sale for non-payment of the price does not invalidate the consent given by A to the placement of the copy on the EEE market;
- moreover, it would be unfair for C to bear the consequences of a failure by a third party (B) to perform a contract to which C has no link.

In Republic of Korea, C will be protected because of the contract law's provision.

In the Netherlands, dissolution of an agreement does not have any retroactive effect.

In Portugal, the seller cannot terminate the sale contract based on non-payment on the part of the buyer, and thus, the fact pattern does not raise any issue.

Some Groups are of the opinion that C may rely on exhaustion of A's right of distribution, but whether or not C will keep the right of ownership/title to the tangible copy depends on particular circumstances (Czech Republic). In Czech Republic, the principle of relative invalidity applies to the cancellation of an agreement.

Some Groups clearly state (4 Groups: Australia, Sweden, the UK and Ukraine), or suggest the possibility (2 Groups: Belgium and Bulgaria), that if the terms of the agreement between A and B provide that the transfer of ownership of the tangible copy from A to B will only take place after full payment of the price by B, C will not have ownership/title to the tangible copy and A may exercise the right of distribution against C.

The Brazilian Group only states that C shall keep the right of ownership to the tangible copy.

Some Groups note that as there is no definite rule for this scenario, the outcome is uncertain (3 Groups: Austria, Canada and Estonia). The Austrian Group also points out that the solution must depend on the circumstances of the individual case and the interests of the third persons and the author must be carefully balanced.

Japan seems to be the only reporting country where a lower court has issued a decision in a similar case. The Tokyo District Court ruled that C may not rely on the exhaustion of the right of distribution because there is no lawful transfer from A to B due to the cancellation by A of the sales agreement between A and B. Since cancellation of an agreement has a retroactive effect according to the Japanese Civil Law, C may keep the ownership/title of the tangible products.

e) Are there any statutory exceptions to the exhaustion of rights, e.g. transformation of the work by the licencee/buyer prior to re-selling?

The Swiss Group points out that exhaustion only takes place when the copy remains unaltered

with a limited exception for architectural works.

Some Groups point out that there is no statutory exception regarding the transformation of the work or a copy thereof (11 Groups: Bulgaria, Canada, Czech Republic, Hungary, Japan, Latvia, Mexico, Sweden, the UK, Uruguay and the US).

Some Groups point out that since copies circulated with the consent of the author are subject to exhaustion, if the licensee has transformed the work substantially, the principle of exhaustion does not apply (6 Groups: Austria, Finland, Italy, the Netherlands, Ukraine and Venezuela). Similarly, the Australian Group points out that the act of "transforming" a work is likely to involve one or more acts within the exclusive rights of the copyright owner, such as the act of reproducing the work in a material form, and/or the right of adapting the work and that if so, the copyright owner may prevent the resale of goods that include the infringing, although "transformed," work.

Some Groups point out that although there is no specific provision containing a specific restriction of the principle of exhaustion where the condition of the goods is changed, the author shall have, in addition to moral rights, the right to authorise or prohibit the adaptation of the work (12 Groups: Belgium, Brazil, China, Denmark, Egypt, Estonia, France, Paraguay, the Philippines, Portugal, Romania and the UK).

The Mexican Group points out that the only exception to the exhaustion of rights is established in Article 104 of the Mexican Copyright Law in connection with the distribution and rental of software.

The Philippine Group points out that the Intellectual Property Code grants the author the right to the proceeds of subsequent transfers of all copies of the copyrighted work. The author and his/her heirs are given the inalienable right to 5% of the gross proceeds of any and all sale or lease subsequent to the first disposal.

The Singaporean Group points out that there is an exception where there is no copyright owner in the country of manufacture.

f) May the exhaustion of rights be waived contractually?

Some Groups point out that the exhaustion of rights may be waived contractually (12 Groups: Argentina, Brazil, Guatemala, the Dominican Republic, Italy, Japan, Mexico, Paraguay, Peru, the Philippines, Romania and Venezuela). The Mexican Group adds that the exhaustion of rights may be waived contractually, but only in relation to a determined person or group of people. In other words, the parties in the contract are able to establish the prohibition to assign, re-sell or distribute the work but only to a determined person or group of people.

On the other hand, other Groups point out that the exhaustion of rights may not be waived contractually (12 Groups: Austria, Bulgaria, El Salvador, Czech Republic, Egypt, Finland, Hungary, Latvia, Portugal, Singapore, Turkey and Ukraine). The Bulgarian Group adds that the parties could agree on the moment when the ownership might be transferred (upon delivering the goods, upon payment of the price) and in such cases, the exhaustion will occur once the contractually agreed transfer of ownership happens.

The above two answers do not necessarily exclude each other since some Groups in the former could be of the opinion that although the exhaustion of rights may be waived contractually such contract does not prevent the exhaustion of right from occurring in connection with a third party, while some Groups in the latter could opine that the rightholder and the party which purchases a copy from the rightholder may lawfully agree that the purchaser may not assign the copy to a third party.

Some Groups expressly indicate that point, namely they mention that the exhaustion of rights may be waived contractually, and such a contract does not prevent the exhaustion of right from

occurring in connection with a third party. In other words, a third party may rely on the exhaustion of the rights against a claim by the rightholder (11 Groups: Belgium, China, Denmark, Estonia, the Netherlands, Norway, Republic of Korea, Russia, Sweden, Switzerland and the UK). Some Groups (3 Groups: Denmark, Estonia and Sweden) point out that whether or not such contractual restrictions are valid and enforceable is not known.

The French Group points out that although the author may not contractually prevent application of the rule of exhaustion when the conditions for application thereof are met, this leaves open the question of whether the author may restrict, by contract, the scope of his/her consent to the placement of a work on the market within the European Economic Area (EEA), which, in practice, would prevent application of the rule of exhaustion when certain contractual restrictions relating to the specific subject matter of the copyright have not been complied with. They opine that, assuming that the principles developed by EU and French case law regarding trademark, patent and plant variety licence agreements may indeed be transposed to copyright, it should be inferred therefrom that, if the copy of the work is placed on the EEA market by a third party, in particular a licensee, then exhaustion of rights only occurs if the rightholder has consented to said placement. This would imply that the restrictions imposed by the holder on the exercise of his/her rights have been respected. However, non-compliance by the licensee with contractual restrictions imposed by the rightholder when placing copies of the work on the market could only be invoked to oppose the subsequent marketing of said copies by third-party purchasers if these restrictions relate to the specific subject-matter of copyright (such as the authorised media or exploitation modes, or the territory where the first placing on the market is allowed). Only such restrictions would be enforceable *erga omnes*, because they relate to the very essence of the authors's rights of exploitation. They also point out that the question of the enforceability of contractual restrictions imposed by the rightholder on the market has not yet been decided by the French Supreme Court or by the CJEU in the area of copyright, and hence the question of whether and under what conditions such restrictions could preclude the exhaustion of copyright remains unsettled in French law.

Some Groups point out that this issue has not been judicially considered and there are no statutory provisions dealing with it (2 Groups: Canada and Uruguay).

The US Group points out that although this issue continues to work itself through the courts in several jurisdictions in the United States, the Court of Appeals for the Seventh Circuit has held that the exhaustion of rights from a sale can be waived contractually and are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). See, *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

4) What is the rationale/justification under your law for the exhaustion of rights?

With regard to the rationale/justification for the exhaustion of rights, (1) some Groups point out a legislative intent (4 Groups: Austria, Japan, Romania and US), (2) some Groups point out the decision of the Supreme Court (2 Groups: Canada and Japan) and (3) many other Groups indicate scholarly views or their own views. Some Groups just point out that there is no statement of the law about the rationale/justification for the exhaustion of rights and it is construed from the doctrine and case law (2 Groups: Argentina and Brazil).

Some Groups point to the free movement of goods as the sole or main rationale/justification for the exhaustion of rights (5 Groups: Belgium, Paraguay, Peru, Portugal and US) or the balance between the free movement of goods (or the interests of owner of goods) and the interests of the rightholder (19 Groups: Austria, Canada, China, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, the Netherlands, Norway, the Philippines, Republic of Korea, Sweden, Switzerland the UK and Ukraine). Specifically, the Peruvian Group states that to reduce the number of potential barriers in connection with the right of distribution of the author and which are likely to affect the authorised marketing of the specimens to be placed on the market through sale

or other means of transfer of ownership.

In this connection, the Austrian Group opines that the purpose behind the principle of exhaustion is that after the first sale of the works the exclusive interests of the author must be subordinated to the interests of the acquirer in his beneficial title. The author should not be granted a kind of exclusive trade permission for certain works, which have already been once circulated in the market with the consent of the author.

Similarly, some Groups point out that the rightholder has an opportunity to receive compensation for his/her work during the first sale or transfer of a particular copy and thus the rightholder should not require protection for redistribution of that particular copy as he/she is already fully compensated while lack of exhaustion would hinder free trade of goods (6 Groups: Egypt, Finland, Japan, Republic of Korea, Switzerland and Ukraine).

Also, the Canadian Group refers to a Supreme Court decision in which the Court phrased the issue in the case as “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”. It was further opined that this balance requires imposing limits on the rights of intellectual property holders: “once an authorized copy of the work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it”.

Further, the Chinese Group points out that if the distribution of right under the copyright law is not exhausted, the distribution right will inevitably clash with the property rights, in particular, the right of disposition, under the property law. Other Groups also point out a conflict with the right of ownership on lawfully acquired tangible property or the interests in an unimpeded movement of goods, allowing the owner of a copy of the work the unrestricted exercise of its ownership rights (6 Groups: Finland, Hungary, Norway, Switzerland, the UK and the US). In this connection the US Group mentions that the congressional reports repeatedly refer to the ability of the owner of a material copy to dispose of that copy as he sees fit.

The Danish Group also points out that another justification can be found in the fact that the principle of exhaustion of rights enhances legal certainty.

Also, some Groups mention secondary markets (3 Groups: Austria, Hungary and Norway). That is, if any further sale of already circulated works were dependent from the consent of the author, all secondary markets with copyright protected works would be prevented.

Some Groups point out, among other things, that the rightholder should not be able to effectively control competition in the distribution chain (5 Groups: Norway, Australia, Switzerland, the UK and the US), which lowers prices to consumers (Australia).

The Singaporean Group points out that the rationale for the exhaustion of rights is that of public interest – that there are benefits to the public when genuine copies of copyright work can be made available to the Singapore public at a lower price.

Some Groups point out harmonisation of laws as the rationale/justification for the exhaustion of rights (7 Groups: Bulgaria, Czech Republic, Latvia, Romania, Sweden, Turkey and Venezuela).

International exhaustion (specific issue 1)
5) Does your law recognise international exhaustion of copyright? Specifically, if a copyright-protected work stored on a tangible medium (such as CD or DVD) which was lawfully made and distributed outside your jurisdiction is imported into and sold in your jurisdiction, may the holder of the copyright in your jurisdiction assert his/her copyright against such copy?

(i) Regional exhaustion (17 Groups)

Under Article 4 of Directive 2001/29/EC, the EU only recognises exhaustion for works first sold by rightholders within their respective territories and does not recognise exhaustion for works first sold by rightholders outside EU countries. This is referred to as regional exhaustion. The regional restriction to the member countries of EU has been widened through an international agreement also to countries of European Economic Area (EU, Iceland, Liechtenstein and Norway) (EEA). This gives to the rightholders an instrument how to prevent the parallel imports from countries outside the EU and EEA (17 Groups: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, the Netherlands, Norway, Portugal, Romania, Sweden and the UK).

The Belgian Group and the UK Group add that the European Court of Justice even clearly excluded a national rule that would extend the principle of exhaustion to a sale or transfer outside the Community:

> *"Article 4(2) of Directive 2001/29 is to be interpreted as precluding national rules providing for exhaustion of the distribution right in respect of the original or copies of a work placed on the market outside the European Community by the right holder or with his consent."*

There are some minor exceptions in some EU countries.

The Danish Group adds that the rules are different when it comes to lending, renting and the right to exhibit the work in public. In Denmark, the right to lend works other than cinematographic works and copies of computer programs in digital form is subject to international exhaustion. The right to rent works of architecture and applied art are also subject to international exhaustion. Section 20 of the Act does not specify regional exhaustion with respect to the right to exhibit a work in public. This suggest that international exhaustion applies with respect to this right.

Finland also has minor exceptions. Under the Finnish Copyright Act, international exhaustion is applied when a work 1) is made available to the public by lending; 2) is sold or otherwise permanently transferred if the copy to be transferred is one acquired by a private individual for private use; 3) is sold or otherwise permanently transferred if the copy to be transferred is the one acquired by an archive, or by library or a museum open to the public, for its own collections.

Norway has two exceptions where international exhaustion will apply. *Firstly*, the principle of international exhaustion will apply where the copy has been acquired by a person for private use, e.g., an immigrant from the Far East will, regardless of the right holder's copyright, be able to sell a copy of a book from his of her home country to a second hand book shop. Secondly, the principle of international exhaustion will apply to copies that are further distributed through rental or lending.

(ii) National exhaustion (7 Groups)

Laws in some jurisdictions do not recognise international exhaustion of copyright at all (7 Groups: Brazil, the Dominican Republic, Paraguay, Peru, Turkey, Ukraine and Uruguay). Thus, if a copyright-protected work stored on a tangible medium lawfully made and distributed outside the jurisdiction is imported into and sold in the jurisdiction, the holder of the copyright in the jurisdiction may assert his/her copyright against such copy.

(iii) International exhaustion (11 Groups)

In some jurisdictions, international exhaustion is generally, or to some extent, recognised (11 Groups: Australia, Canada, El Salvador, China, Egypt, Japan, Mexico, the Philippines, Singapore, Switzerland and US). In some reporting countries, exhaustion is provided for by a statute (2 Groups: Egypt and Japan). In Japan, with regard to the right of ownership transfer regarding works other than cinematographic works, international exhaustion is recognised by statutory law, while, with regard to the right of distribution of cinematographic works, neither statutory law nor

case law recognise international exhaustion at this stage.

In Republic of Korea, although there is neither a statutory law nor case law in that regard, the majority of the legal commentators believes that international exhaustion of copyright should be recognised to ensure stable, predictable, and secure international transactions.

In Switzerland, there is one specific reservation to the general principle of international exhaustion, which provides that audio-visual (cinematographic) works, (films, but not e.g. computer games) must not be sold or leased as long as such selling or leasing would impair the right of performance of such cinematographic work. The purpose of this provision is to protect the traditional exploitation chain of theatrical movies. A DVD of a movie that is still shown in Swiss cinemas must not be sold or leased in Switzerland even though the movie is no longer shown in cinemas of other countries and available there on DVD. In practice, the rule has a major impact on parallel imports of DVDs.

In Canada, there are two legislative provisions that are relevant to this issue: (a) Section 3(1)(j) of the Copyright Act provides for the exhaustion of the copyright owner's right to sell or transfer ownership where ownership in a tangible object has previously been transferred "in or outside Canada" with the authorisation of the copyright owner. The section has yet to be interpreted by the courts but the intention appears to provide for a form of international exhaustion whether or not the initial transfer of ownership in the tangible object takes place in Canada. How this provision applies to tangible media such as CDs or DVDs has not been considered by Canadian courts. (b) Section 27(2) dealing with secondary infringement provides that certain authorised copies of copyright protected works made outside of Canada will be deemed infringing where the person who made them would not have been authorised to do so in Canada. Specifically, the Canadian holder of the copyright in Canada may assert his/her copyright against such works, if they would infringe copyright if made in Canada subject to some possible exceptions.

In Australia, in general, the law does not recognise international exhaustion, but there are important exceptions where international exhaustion is effectively recognised. Namely, the principle of international exhaustion is given effect to record imports for commercial purposes, computer program imports for commercial purposes, electronic literary or music items imports, imported articles and accesories, book imports (to a limited extent). In the case of DVDs containing cinematographic films, the principle of territoriality still applies.

(iv) Other

In Russia, the proper answer for this question shall depend on a variety of conditions. If any re-export should be realised by licensee in respect of licensed and localised computer programs outside the territory of the Russian Federation such unlawful distribution should be ceased in accordance with appropriate provisions in the licence agreement between the RF licensor and foreign licensee.

6) If your law recognises international exhaustion of rights, what is the rationale/justification under your law for such international exhaustion?

(i) Some Groups which stated in the previous question that (a) they do not recognise international exhaustion or (b) they only recognise regional exhaustion just state that this question is not applicable ((a) 5 Groups: Argentina, Brazil, the Dominican Republic, Paraguay and Peru; (b) 12 Groups: Austria, Czech Republic, Estonia, France, Hungary, Italy, Latvia, the Netherlands, Portugal, Romania, the UK and Ukraine).

(ii) Some Groups whose national law recognises regional exhaustion state that regional exhaustion is based on the principle of free movement of goods (Belgium) or required for harmonisation in the region (Bulgaria).

(iii) Some Groups which recognise international exhaustion provide some reasons as below:

(a) The Canadian Groups introduced some explanation as follows:

The apparent purpose of s. 27(2)(e) is to give Canadian copyright holders an added layer of protection where the Canadian copyright holder does not hold copyright in that work in foreign jurisdictions. Section 27(2)(e) protects Canadian copyright holders against “parallel importation” by deeming an infringement of copyright even where the imported works did not infringe copyright laws in the country in which they were made. Without s. 27(2)(e), the foreign copyright holder who could manufacture the work more cheaply abroad could flood the Canadian market with the work, thereby rendering the Canadian copyright worthless. Section 27(2)(e) thus represents Parliament’s intention to ensure that Canadian copyright holders receive their just rewards even if they do not hold copyright abroad.

(b) The Danish Group points out that their justification for international exhaustion with respect to lending is that it would be too time consuming and difficult to get the consent from the rightholder in connection with lending out of literature from libraries.

(c) The Finnish Group points out that the rationale for international exhaustion recognised for private individuals is that limiting the redistribution right of private persons would be very difficult to control and enforce and would unreasonably limit their rights of ownership to the tangible object. Cultural reasons favour international exhaustion of rights instead of regional exhaustion in the case of archives, libraries and museums as anything less would conflict with their function as safeguards of cultural heritage and cultivators of education and knowledge. Finally, practical reasons favour these institutions’ right to dispose imported works to general public when removing works from their collections instead of destroying them.

(d) The Norwegian Group points out that the reason for the two exceptions referred to above seems, to a large extent, to be based on considerations related to cultural policy.

(iv) Some Groups which recognise international exhaustion indicate (1) the same/similar rationales/justifications as/to, those mentioned for domestic exhaustion in Question 4 above (6 Groups: China, Egypt, Japan, Republic of Korea, Singapore and Switzerland), (2) the development of international trade or distribution for copyrighted goods (4 Groups: Japan, Mexico, the Philippines and Republic of Korea) and (3) international treaties (3 Groups: Mexico, Republic of Korea and Switzerland).

The Japanese Group specifically introduces their legislative intent, that is, increasingly large quantities of copyrightable works are widely distributed across the national border with the advance of economic globalization, and it is reasonable to meet the need to ensure (1) smooth distribution and (2) safety of transactions, in the context of not only in domestic but also international transactions. The Mexican Group points out the actual global market and international treaties.

The Swiss Group points out (1) that the regime of international exhaustion allows parallel imports, which generally lead to price competition which is a positive effect from a macroeconomic point of view; (2) that the Federal Supreme Court argued in FCD 124 III 321 that the copyright holder is in a position to realize the economic value of his copyright protected work with the first sale, irrespective of whether this first sale takes place in Switzerland or abroad and thereafter the first sale, the legitimate interests of other market players (e.g. wholesalers, retailers) and consumers regarding a free circulation and trading of copies of the work must take precedence over the economic interest of the rightholder (FCD 124 III 321, p. 332 et seq.); and that (3) the Federal Supreme Court justified the international exhaustion by taking a more socio-cultural view and argued that the cultural exchange is of crucial importance for a small country like Switzerland. The general public’s legitimate interest in the full and free access to foreign cultural goods must therefore outweigh the economic interests of the rightholder (FCD 124 III 321, p. 332 et

seq.).

The US Group states that the Supreme Court's determination was largely based on statutory construction of the phrase "lawfully made under this title" in Section 109 of the U.S. Copyright Act and that in attempting to resolve conflicting language in the Act, the Supreme Court found that "lawfully made under this title" did not impose a geographic restriction on the creation of a copy.

On-line exhaustion (specific issue 2)
7) Does your law recognise on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works? Under which conditions are which kind of rights in different kinds of copyright-protected works exhausted?

It seems that in almost all reporting countries, no statutory law specifically provides for on-line exhaustion.

(i) EU/EEA countries

In EU, as stated in the Working Guidelines, the CJEU decision *UsedSoft v. Oracle* (of July 3, 2012; C-128/11) has recognised exhaustion of copyright for permanent copies of computer programs downloaded online under certain conditions. Although countries in EU/EEA should be obliged to follow this decision, there are certain nuances for on-line exhaustion in EU countries.

(a) Some groups point out that, aside from *Usedsoft* judgment of the European Court of Justice, although there are no specific provisions in their national laws with respect to on-line exhaustion, their national laws in principle probably do not recognise on-line exhaustion more generally because only tangible items are subject to exhaustion (7 Groups: Austria, Belgium, Czech Republic, Finland, Italy, Norway and Portugal). The Finnish Group indicates that the distribution of works in digital form falls legally under the right of communication to the public and that the distribution right concerns only distribution of tangible copies of works while the right of communication is not exhausted at all. It also points out that downloaded copies are always new copies of works and that the reproduction right is thus also involved when works are communicated to the public.

In Italy, Art. 17.3 l. 633/1941 expressly excludes the exhaustion effects when the work is distributed by means of an on-line connection, even if the downloading of the copy is authorised by the copyright owner.

The Belgian Group points out that the extension of online exhaustion to other works than computer programs might be even more questionable after the Nintendo judgment (E.C.J. 23 January 2014, C-355/12, Nintendo Co. Ltd a.o. / PC Box Srl and 9Net Srl, www.curia.eu.) in which the CJEU insisted on the distinction between computer programs and other works. The Court emphasised that "other works" are not subject to Directive 2009/24 but only to Directive 2001/29, which might indicate that the solutions are not necessarily the same under the two directives. Some other Groups also opine or suggest that with respect to the works other than computer programs, exhaustion would not apply for similar reasons (5 Groups: Denmark, France, Hungary, Italy and Norway).

The UK Group notes that the UK government's proposed new regulations relating to private copying (the Copyright and Rights in Performances (Personal Copies For Private Use) Regulations 2014), which, although not expressly provided for, may be capable of ushering in an implied exhaustion regime for downloads although they may well not be implemented in their current form, or at all.

(b) Some Groups indicate that their laws probably recognise on-line exhaustion (3 Groups: Bulgaria, the Netherlands and Sweden).

The Bulgarian Group points out that as far as Art 18a, paragraph (3) of the the Law on Copyright and Neighbouring Rights (LCNR) provides an exception that the exhaustion does not apply to the cases of providing originals of the work or copies thereof by digital means in respect of the materialised copies of the work which had been made by the recipient with the consent of the copyright holder. It could be concluded that the Bulgarian law recognises the on-line exhaustion in general. However, the Bulgarian LCNR does not provide different regimes for exhaustion depending on the type of distribution (online or material) or depending on the kind of the copyright-protected works.

(ii) Non-EU/EEA Countries

(a) Some Groups point out that there are neither statutory laws nor case laws regarding on-line exhaustion and that how it will be treated is unknown (7 Groups: Argentina, Brazil, Canada, the Dominican Republic, Russia, Singapore and Uruguay). The Mexican Group notes that the treatment of any work supported in other non-traditional materials, shall be the same regardless the material support and that, however, the differences of the material support may change the way in which the exhaustion of rights occurs or is regulated.

(b) Some Groups point out that their national laws probably recognise on-line exhaustion (7 Groups: Guatemala, El Salvador, Paraguay, Peru, the Philippines, Venezuela and Switzerland).

In Switzerland, there is a lower court decision of 4 May 2011 (prior to the CJEU *UsedSoft* v. Oracle case) by the Sole Judge at the Cantonal Court of Zug (sic! 2012 99) in preliminary injunction proceedings which ruled that the transfer of a computer program on-line under an agreement titled "license" leads to the exhaustion of the rights in that copy of the software, provided that (i) the transfer is not limited in time ("perpetual" right to use) and that (ii) the consideration paid by the user covers such "perpetual" use. In addition, the court mentioned that it considers the rights to be exhausted in a software copy in general if there is no contractual obligation to return the software copy and the transferor does not retain any (factual) power over the particular software copy. In the Swiss Group's opinion, the court's argumentation relies on a more contemporary reading of the words "copy of a work" and "transfer" in the statute, which is convincing, and the ruling might well be followed by higher courts in similar cases (both for software and for other kinds of works).

(c) Some Groups point out that their national laws probably do not recognise on-line exhaustion (7 Groups: Australia, China, Japan, Republic of Korea, Turkey, Ukraine and the US). Among such Groups, some of them opine that as their laws make a distinction between the right of distribution for tangible goods of the work and the right to communicate a work to the public, it can be construed that the right of distribution does not extend to the network environment (4 Groups: Australia, China, Japan and Republic of Korea).

Under the US law, the first sale doctrine applies only to physical copies, not digital copies. The controlling statute is §109 of the U.S. Copyright Act. Section 109 states that the defense applies only to "copies" and "phonorecords." The definition of the terms "copy" and "phonorecord" in §101 of the U.S. Copyright Act defines each as "material objects."

The leading court decision on whether the first sale doctrine applies to digital copies is *Capitol Records v. Redigi Inc*., 934 F. Supp. 2d 640 (SDNY 2013) from the federal district court from the Southern District of New York. In that case, the court concluded that an online service designed to permit owners of digital iTunes ® files to re-sell their music files infringed the copyrights in the works embodied in the music files because:

a) The transfer of the digital files necessarily involved reproductions of the works and therefore constituted a violation of the copyright owner's exclusive reproduction right, to which the first sale doctrine is not a defense; and
b) The transfer of files also involved a violation of the copyright owner's exclusive distribution right, to which the first sale can be a defense but in this case was not because the first sale doctrine is limited to
    i) Lawfully made copies, which these were not; and

ii) The owner's particular copy, which this was not.

The court further found that the service did not qualify under the fair use doctrine because:

a) The use was not transformative and was commercial;
b) The music works were at the "core of copyright protection;"
c) The works were copied in their entirety; and
d) The resulting copies were direct substitutes for the original.

The court stated in its opinion, "the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce…." It is important to note that under US law, the decisions of a district court are not binding, even on other courts in the same district. In the absence of a controlling authority, however, courts often view other district court opinions (particularly, in a copyright case, New York district court opinions) as persuasive.

Supporting this judicial opinion is a 2001 Report of the U.S. Copyright Office, *Library of Cong., DMCA Section 104 Report (2001)*, which concludes that the FSD does not properly apply to digital goods.

8) Are rights exhausted in a perpetual or non-perpetual licence? Are "re-sellers" of digital copies allowed to further re-sell such digital copies under the circumstances described in UsedSoft v. Oracle? Can multi-user-licences be split up and sold separately?

(i) EU/EEA countries

[Non-perpetual licence]
Some groups point out that there is neither statutory law nor case law with respect to this "non-perpetual licence" issue and two other issues below (6 Groups: Austria, Finland, Hungary, Latvia, Norway and Portugal). The Finnish Group points out that, in principle, perpetual and non-perpetual licences are not treated differently, although, in practice, it may be more probable that a perpetual licence would be regarded as comparable to sales of goods rather than a non-perpetual licence.

The Belgian Group points out that in view of the *Usedsoft* decision that allows a (limited) on-line exhaustion in relation to downloaded copyrightable works, it can only temporarily be concluded that, with respect to the *Usedsoft* situation, the distribution right is only exhausted in the case of a perpetual licence. Other Groups have a similar view (6 Groups: Bulgaria, France, the Netherlands, Romania, Sweden and the UK).

In Estonia, it should be noted, however, that under § 374 of the Law of Obligations Act, both parties to the licence contract are allowed to terminate a perpetual licence with one year's notice. It follows that in Estonia granting a perpetual licence (for an unlimited period) might not fall under the concept of "distribution" as prescribed in the Copyright Act and interpreted by CJEU as it can be easily terminated. Thus, under the Estonian national laws the concept of a "sale" with a licence agreement seems to be more similar with the use of a long-term non-perpetual licence.

[Further re-sell]

Some Groups point out that in view of the *Usedsoft* decision, the resellers of digital copies are only allowed to further resell such digital copies under the circumstances described in *Usedsoft* (7 Groups: Belgium, Denmark, France, the Netherlands, Romania, Sweden and the UK). The Dutch Group points out that it is still unclear whether their 'right to resell' also applies to custom software.

[Multi-user-licences]

Some Groups point out that in view of the *Usedsoft* decision, multi-user-licences cannot be split up and sold separately (6 Groups: Belgium, Denmark, France, the Netherlands, Romania and the UK).

The Finnish Group expressed the same view without mentioning the *Usedsoft* decision.

The Austrian Group notes that although there is neither statutory law nor case law with respect to this issue, there are opinions for the argument that the splitting of multi-user licences should be deemed as admissible, provided that such a licence is qualified as a number of permits to use. However, this could only be argued if the acquirer obtains, for each individual use right of the multi-user licence, a separate copy of the program. If the acquirer only receives a master copy of the program and the right to install the software on this basis several times, the resale of only separate use rights (which from a technical point of view would require the first purchaser to transfer the master copy) would not be admissible.

The Swedish Group points out that if the multi-user-licence does indeed constitute a licence according to the above, no sale has occurred. Since no sale has occurred, no copyright has been exhausted under Sec. 19 Swedish Copyright Act and the multi-user-licence cannot be split up and sold separately without infringing the rightholder's copyright. However, under the circumstances described in *UsedSoft*, and in light of the applicability of CJEU case law in Sweden, it is likely that a Swedish court would find that multi-user-licences constitute a sale of several copies (albeit not physical ones) of a copyright licence. Since copies of the copyrighted work have been sold by the rightholder to a third party, the copyrights in the copies have been exhausted and those copies can be re-sold by the third party in its capacity as owner of those copies under Sec. 19 Swedish Copyright Act.

(ii) Non-EU/EEA Countries

(a) Some Groups point out that there are neither statutory laws nor case law regarding on-line exhaustion and that how it will be treated is unknown (6 Groups: Argentina, Brazil, Canada, Peru, Singapore and Turkey).

In Guatemala, it seems that it may be deemed that the copyright is exhausted in the event of an exclusive licence. It appears that, in the Dominican Republic, it would depend on the provisions included in the licence agreement. If it prohibits licensing to a sub-licence or selling the media, the copyright holder would prevail.

The Peruvian Group opines that the terms and conditions of the licence should always prevail and, by default, exhaustion should be interpreted in a restrictive way.

(b) Some Groups opine that since their laws probably do not recognise on-line exhaustion, (1) rights are not exhausted in a perpetual or non-perpetual licence; (2) "re-sellers" of digital copies are not allowed to further re-sell such digital copies under the circumstances described in *UsedSoft v. Oracle*; and multi-user-licences cannot be split up and sold separately (4 Groups: Australia, Japan, Republic of Korea and the US). Other Groups seem to have a similar view (3 Groups: Mexico, Ukraine and Uruguay).

The Philippine Group believes that the re-sellers of digital copies are prohibited to re-sell such digital copies under the circumstances described in *UsedSoft vs. Oracle* and that by adopting the ruling of the United States Federal Court of Appeals for the Ninth Circuit in the case of *Vernor v. Autodesk,* (621 F. 3d 1102 (2010), the Philippines probably does not allow the resellers to further resell digital copies because the purchaser or transferee of the copyright-protected work will only be considered as a licencee and not an owner over the digital copies.

(c) The Swiss Group points out that the transfer of a digital copy of a computer program for an indefinite period of time against payment of a one-time licence fee corresponding to the value of that copy may be considered a "sale" irrespective of the title of the agreement, in which case the right of further distribution should be considered exhausted under the above-mentioned decision of the Sole Judge at the Cantonal Court of Zug (cf Question 7), which confirmed the exhaustion for a computer program that has been transferred electronically, i.e., on-line. Pursuant to this decision,

re-sellers of digital copies are generally allowed to further re-sell digital copies. There is currently no case law as to whether multi-user-licences can be split up and sold separately in Switzerland, but the Swiss Group opines that if (1) the multi-user licence is considered a sale triggering exhaustion and (2) the acquirer is entitled to make several copies that are independent from each other, there should be no objection to the splitting up and reselling of each work copy.

9) Is a distinction made for each kind of copyright-protected work (computer programs, music files, e-books and videos)?

(i) EU/EEA countries

(a) No distinction

The Austrian Group points out that the predominant legal literature determines that these principles must be applicable to all digital works and that a distinction in the treatment of online-works would not be appropriate. The same view seems to be shared by other reporting countries such as Czech Republic.

In some reporting countries, there is no objective specific basis in terms of legislation or jurisprudence that would distinguish the types of work in the admissibility of on-line exhaustion (6 Groups: Belgium, Bulgaria, Finland, Latvia, the Netherlands and Sweden).

(b) Yes, there is a distinction

Some Groups mention the *Nintendo v PC Box* decision of 31 January 2014 (C-355/12), in which the CJEU held that when a video game, as a complex work, comprises “not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption […], they are protected, together with the entire work, by copyright under the system established by Directive 2001/29". Such groups opine that it must be concluded from the above case law that, *de lege lata*, complex works that cannot be reduced to their computer program dimension appear to be subject to the general exhaustion regime, which expressly excludes the possibility of invoking exhaustion in respect of intangible copies (3 Groups: France, Hungary and the UK). It seems that the Norwegian group has a similar view.

The Estonian Group reports that distinction is not made for each kind of copyright-protected work but the Copyright Act does distinguish databases and computer programmes from other copyright-protected works. The respective regulations are set forth under §§ 90 (1) and 91 of the Copyright Act where it derives that the exhaustion of distribution right for databases and computer programmes is restricted to the first sale within the European Union only (compared to other copyright-protected works where exhaustion also takes place in case of the first sale in the contracting parties of EEA Agreement). Other digital works should be governed by the same general principles as applicable for other kind of works, either tangible or intangible.

(c) Uncertain

Some Groups state that it is uncertain at this stage how national courts will deal with this issue (2 Groups: Denmark and Romania).

(ii) Non-EU/EEA Countries

(a) N/A or no distinction

Some Groups report that there is neither statutory law nor case law that recognises on-line exhaustion itself or that distinguishes one type of work from another in applying on-line exhaustion in function of the type of work (16 Groups: Canada, Guatemala, the Dominican Public, El Salvador,

Japan, Paraguay, Peru, Republic of Korea, Russia, Singapore, Switzerland, Turkey, Ukraine, Uruguay, the US and Venezuela). This seems also apply to other reporting countries (2 Groups: China and the Philippines).

(b) Yes, there is a distinction

Some Groups point out that there is a distinction between computer programs or software and other works with respect to online exhaustion although it is not certain whether on-line exhaustion is recognised in their countries (3 Groups: Brazil, Egypt and Mexico). The Brazilian Group points out that it is possible to say that only software is treated differently, since the specific law expressly addresses exhaustion of rights. No other intangible means have specific regulation regarding this matter. The Egyptian Group points out that there is a distinction between computer programs and videos. Music files and e-books were not specifically addressed, but the provisions applicable to computer programs may be implemented in the case of music files and e-books by analogy.

10) If your exhaustion regime for digital works differs from that for analogue works, what is the rationale/justification for such difference?

(i) Justification for difference

The Australian Group points out that to the extent that exhaustion applies to physical goods, but not online goods, the different treatment is primarily justified by qualitative differences arising from the nature of the goods and their mode of distribution. That is, a copyright owner whose work is reproduced in physical goods should price the goods in such a manner that the first sale of the goods will fairly compensate it for the value of its copyright. If the copyright owner chooses to sell goods at a wholesale level, it should not generally be allowed to control downstream distribution, as this may allow it to extract an unfair remuneration from its copyright, and inhibit competition. This is ultimately harmful to consumers.

However, there are sound reasons for not applying this rationale in the context of online goods because
(1) there is no problem of scarcity in relation to online goods, so that the copyright owner should be able to fully meet consumer demand through the trade channels it approves;
(2) online goods do not deteriorate in quality, so (assuming retail sales are made by or with the authority of the copyright owner), any parallel trade would compete directly with the copyright owner, and thus affect its ability to obtain a fair remuneration;
(3) it may be difficult to distinguish “legitimate” parallel trade in online goods from piracy, because by definition any parallel trade involves trade that is not directly authorised by the copyright owner;
(4) the practice has invariably been followed by copyright owners of granting licences with respect to online goods, which set out comprehensively the rights of the recipient;
(5) copyright owners typically protect their works using access and copy control mechanisms or systems, which are becoming increasingly sophisticated. Circumvention of such mechanisms generally contravenes the Act. Any change to permit parallel trade in online goods, in order to have any practical value, would need to include amendments to those provisions of the copyright law concerned with technological protection measures;
(6) online distribution is a fast moving area of technology. The distribution models that apply today may soon be superseded by models that effectively allow the authorised transfer of digital files, and the creation of controlled resale markets. It is preferable to wait for technological and contractual solutions unless there is a compelling rationale to pre-empt these.

The Austrian Group points out that it is argued that digital works are more likely to be distributed and copied because of the technological capabilities of reproducing data fast, over a wide range and without any loss in quality. Therefore one generally can assume a higher risk of abuse. Some Groups seem to have similar views.

The Finnish Group opines that given that downloading always creates a new copy, as the scope of

exhaustion of communication right and the related reproduction right would be much broader in its scope than the exhaustion of distribution right, it would have more severe impacts to rightholders' exclusive rights than the exhaustion of distribution right and would therefore conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the rightholder.

The French Group points out that there is a legal difference between certain works fixed on an intangible medium (digital work in the form of a computer program) and works fixed on a tangible medium (analog work) and believes this difference is due primarily - if not exclusively - to the technical difficulty in confirming that the dissemination of intangible copies of works respects the limits laid down for the exhaustion of rights. In a similar vein, the Italian Group opines that as far as the difference between digital and analogue works is concerned, the rationale is deemed to be that, in the case of online distribution, the rightholder cannot control the number of the users of the digital copies and receive compensation in proportion to the actual use of the work. Also, the Norwegian Group points out that the distinction between analogue works and digital works seems mainly to be based on the consideration to protect the economic interest of the right holder, as it is assumed that the right holder will have difficulties getting adequate remuneration in case exhaustion of digital work is recognised.

The Philippine Group points out that since applying the first-sale doctrine to digital copies affect the market for the original to a greater degree than transfers of physical copies, by reason of the nature of the works and on the degree of difficulty in copying or reproducing the same without the copyright owner's consent, a stricter rule is required in so far as digital works is concerned.

The Korean Group points out that digital works are different from copyrighted works that are fixed in a tangible medium. Not only is the cost of reproduction very low, but also there is no reduction in quality between the original and its reproductions. Moreover, there is no deterioration in quality of the copyrighted works with time. Given these unique characteristics of digital works, if exhaustion were applicable to digital works, then this would decrease the demand for new works, and also, the opportunity for the copyright holder to receive just compensation. As a result, this would undermine the stable, predictable, and secure transactions. Therefore, in applying exhaustion doctrine, digital works should be treated differently from copyrighted works that are fixed in a tangible medium. The Turkish Group seems to have a similar view.

The US Group states that the reasons for not applying the first sale doctrine to digital works as explained in *Redigi Inc*., 934 F. Supp. 2d 640, and in the Copyright Office Report, discussed above in Question 7, include: (a) as a matter of statutory construction, it does not fall within the language of the statute; (b) there are practical differences in secondary markets for physical copies that create "natural brakes" against creating undue harm to copyright owners which practical barriers do not exist in secondary markets for digital goods; and (c) a secondary market for digital goods directly competes with the primary market for the copyrighted works.

(ii) N/A (No difference)

Some Groups indicate that there is no such difference (17 Groups: Brazil, Bulgaria, Guatemala, the Dominican Republic, El Salvador, Czech Republic, Denmark, Egypt, Estonia, Japan, Mexico, the Netherlands, Paraguay, Peru, Russia, Sweden and the UK). The UK Group points out that in the UK, no distinction is drawn between digital and analogue works as such. Rather the distinction is between the distribution of copyright works on tangible media and acts of electronic transmission equivalent in their effect to distribution (such as downloading a new copy online).

Some Groups point out that the Copyright Law does not provide regulation on the exhaustion regime for digital works. There seem no comments regarding the difference between such regime and the one for analogue works (3 Groups: Latvia, Romania and Singapore).

Please note that with respect to this Question 10, it seems that some Groups discuss the

difference between digital works and analogue works, while other Groups discuss the difference between digital copies and analogue copies.

Exhaustion of copyright-protected works in case of recycling and repair of goods (specific issue 3)

11) In the case of recycling or repair of goods which are copyright-protected works, to what extent may one recycle or repair such goods without infringing (1) the right of reproduction, (2) the right of adaptation, the right of arrangement and/or other alteration rights; or (3) the right to integrity?

(i) Only the right of distribution is exhausted

Many Groups confirm that (1) the right of reproduction, (2) the right of adaptation, arrangement and/or other alteration rights; or (3) the right to integrity (the "Three Rights") are not exhausted after the first sale of goods which are copyright-protected works and thus reproduction and/or adaptation of goods must be conducted with the consent of the rightholder, or the author with respect to the right of integrity (moral rights) (11 Groups: Argentina, Austria, Belgium, Bulgaria, China, Czech Republic, France, Portugal, Switzerland, Turkey and the UK). Thus, if a new "copy" is made or the work is considered to be "altered", such conduct is deemed copyright infringement.

(ii) No statutory law (case-by-case approach, etc.)

At the same time, most reporting Groups point out that there is no statutory law with respect to recycling or repair of goods which are copyright-protected works other than computer software (17 Groups: Argentina, Austria, Brazil, Guatemala, the Dominican Republic, El Salvador, Estonia, Finland, France, Latvia, Mexico, Paraguay, Republic of Korea, Romania, Uruguay, US and Venezuela).

Thus, most Groups do not address the exact extent one may recycle or repair such goods without infringing rights. Some Groups opine that this issue is decided on a case-by-case basis taking into account all the circumstances including the type of work and the type of modification (7 Groups: Austria, Belgium, Czech Republic, Mexico, Peru, Romania and US).

(iii) In connection with reproduction right and alteration right

The French Group points out that the reproduction of the substantial part of an intellectual work in principle constitutes infringement, because the substantial part of an intellectual work is *a priori* the original part of the work (i.e. it happens rarely that the originality of the work does not lie in the substantial part thereof).

The Egyptian Group notes that with respect to right of reproduction, it shall not constitute an infringement if the reproduced work is not substantially different from the original work. With respect to the right of adaptation, arrangement and/or alteration, it should not be an infringement if the characteristics of the work are not altered. Some other Groups seem to have a similar view (2 Groups: Peru and Republic of Korea).

The US Group states that as a general rule, lawful owners of copies may do whatever they wish with their copies as long as they do not create a derivative work or reproduce the copyrighted work.

The Dutch Group points out that one may recycle or repair goods to the extent that such recycling or repairing does not imply/involve reproducing the copyright-protected features of the work. Also, the Dutch Group addresses private copying exception.

The Swiss Group reports that for works other than computer programs it is assumed in doctrine that repairs carried out competently and in good faith will not constitute copyright infringements. Such repairs do not affect the individual character of the work and so do not constitute adaptations.

If a repair for technical reasons requires a reproduction of a copyright work, the consent of the copyright holder is not required if the second copy is used for analysing the defect, testing remedy etc. and then destroyed. The right to use and copy a work for private purposes (Art. 19 Copyright Act) may also justify a permanent reproduction of the work, which then may not be re-sold further except within the private circle of the rightholder.

The Canadian Group addresses a court case in which the court stated that repairing artistic works, such as preserving a painting by moving it to a new canvas, or restoring frescoes by replacing the underlying plaster, does not constitute reproduction. The Group also introduced a statutory exception. It is not an infringement of copyright for a library, archive or museum to make, for the maintenance or management of its permanent collection, a copy of a work in its permanent collection if the original is deteriorating, or if the original is currently in a format that is obsolete. Moreover, the Canadian Group introduced another case in which even if recycling or repair constitutes adaptation (and thereby reproduction), it does not infringe if it falls within the following exception: where an artist is hired to design promotional material, such as a sign or logo, courts have found an implied licence on the part of the purchaser to reproduce it, possibly for a new use. The Australian Group also mentions an implied licence.

The French Group bases its analysis on a work of applied art the appearance of which is protected. As a matter of fact, this question has been much debated regarding motor vehicle spare parts (bonnet, mirrors, wings, etc.) in France. The French Group states that if a spare part is itself protected by copyright, the manufacture of the spare part necessarily infringes the right of reproduction and that proving that the spare part is protected by copyright may in practice be difficult.

In this connection, the UK Group opines that where repair involves the copying of a part of a work which is original in itself, in the sense that it represents an individual intellectual creation of its author, the UK court now holds such repair to amount to an infringement of copyright unless the infringement proceedings were thought to be an abuse of dominant position (contrary to Article 102 of the TFEU or Chapter 2 of the Competition Act 1998), or to amount to cartel behaviour (contrary to Article 101 of the TFEU or Chapter 1 of the Competition Act 1998).

The Austrian Group points out that with regard to repair measures requested by the owner of the work, it could be argued that such an adaptation/redesign does not fall within the meaning of Paragraph 14 UrhG, and hence, this must be admissible even without the author's consent.

(iv) Computer Programs

Also, some Groups note that an adaptation of a computer program does not require the consent of the right holder in certain situations (11 Groups: Australia, Austria, Canada, Denmark, Estonia, France, Norway, Russia, Switzerland, the UK and the US). For example, reproduction, translation, adaptation and transformation of the computer program is allowed if (1) the adaptation is necessary in order to use the computer program as intended or (2) to correct errors (5 Groups: Austria, Estonia, France, Norway and the UK). *See* Article 5(1) of the Software Directive. In addition, it is not an infringement of copyright for the person who owns or has a licence to use a copy of a work to reproduce the copy if the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable (2 Groups: Canada and Estonia).

The Swiss Group points out that the Federal Copyright Act (CA) does not contain any express exceptions to these rules for repairs, other than the right to reverse engineer computer programs in order to obtain information on interfaces for interoperability and maintenance purposes (Art. 21 CA; Art. 17 Copyright Ordinance) and the implied (but generally accepted) right to correct errors in computer programs that have been acquired in a way to exhaust the distribution right.

(v) Moral rights

Some Groups indicate some restriction of moral rights.

Some Groups point out that goods which are copyright-protected works may be recycled or repaired without infringing the right of integrity to the extent that it is not, to the prejudice of its author's honour or reputation, distorted, mutilated or otherwise modified (9 Groups: Canada, Denmark, Egypt, the Netherlands, Paraguay, the Philippines, Romania, the UK and the US (for works of visual art)). Moreover, the Canadian Group indicates that the artist's subjective feeling that his or her work has been distorted, mutilated or modified is not determinative. Further, the author's consent may be implied by the conduct of the parties, in which case there is no infringement of moral rights.

Some Groups note that under statutory laws, buildings and utilitarian articles may be altered by the owner without the consent of the author if for technical reasons or for the purpose of their practical use (5 Groups: Denmark, Finland, Japan, Norway and Sweden).

Similarly the Turkish Group points out that only modifications which are considered technically indispensable may be made without permission of the author in the course of the relevant act, e.g., adaptation, performance. In this respect, the doctrine is of the general view that mandatory and necessary (on rightful grounds) modifications of architectural works are possible, as it is necessary to build a balance of interests between the author and the work's owner. In one decision, the Court of Appeals set forth some conditions regarding how to repair a building which is considered as an artistic work:
1- Obligatory repair may be done for the durability of the architectural work and for the extension of the area of use,
2- Comfort and service needs which vary in time should be taken into consideration,
3- Repair shall not damage the architectural work and project, in other words, the entirety of the artistic work,
4- Repair shall not damage the honour and reputation of the author.
It is generaly accepted that the third and fourth conditions are applicable to all artistic works. In other words, if an artistic work needs to be repaired, then the entirety of artistic work should be protected and the honour and reputation of the author should be respected. Only under these circumstances, the author cannot claim that there is infringement to the Three Rights.

The Belgian Group points out a case in which it has been decided that the author does not abuse his right to integrity when claiming that his non utilitarian work – in that case a statue - should be reproduced artfully, after being unartfully repaired, and should be exposed to the public again.

The French Group points out that the majority of case law holds that alteration of a work necessarily infringes the right to integrity of the work, but there is evidence in the case law of a degree of tolerance as regards works with a utilitarian (especially architectural) purpose, by balancing the interests of the author and those of the owner.

Under Japanese statutory law, certain modifications are permitted under statutory provisions including modifications that are considered unavoidable in light of the nature of a work as well as the purpose of and the manner of its exploitation. Within these allowable limits, one may recycle or repair goods that are copyright-protected works.

II. Policy considerations and proposals for improvements of the current law

12) How should the law treat exhaustion of rights? Specifically,
a) Should exhaustion of rights occur for all kinds of works or should exhaustion be limited to certain kinds of works?

(i) All kinds of works

The vast majority of the reporting Groups opines that exhaustion of rights should occur for any kind

of works (28 Groups: Belgium, Brazil, Bulgaria, Guatemala, the Dominican Republic, El Salvador, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Italy, Japan, Latvia, the Netherlands, Norway, Paraguay, Peru, Portugal, Romania, Russia, Singapore, Switzerland, Turkey, the UK, Ukraine and Venezuela).

Some Groups point out that there is no reason to limit exhaustion to certain kind of works (4 Groups: Belgium, Czech Republic, Italy and Singapore). It is desirable to ensure consistency within the copyright regime (France). The existing legal position provides a fair balance between the rights of the rightholders and the users (Denmark).

The Bulgarian Group points out that there should be some exceptions for the rental and lending rights and for the right of royalty in case of resale of works of fine art and the exceptions described by the CJEU in the *UsedSoft v. Oracle*.

The Egyptian Group notes that "exhaustion doctrine" maintains the required balance between the interest of the IP holder and the public interest since it safeguards the market from illegitimacy, abuse, and anti-competitive practices that may be carried out by the IP holders. Therefore, all the protected works should comply with the "exhaustion doctrine" unless the nature of the protected works mandates otherwise.

The UK Group notes that although in principle, because the justification/rationale of exhaustion is based on a context-specific balancing of competing interests, that balance may be struck differently in relation to different kinds of works, it is impractical to limit exhaustion to certain kinds of works. It also points out that it is arguable that the CJEU's *UsedSoft* decision, which is binding on domestic courts, has introduced a different approach for software as opposed to other categories of copyright work.

(ii) Certain kinds of works
(a) Works of art

The Philippine Group opines that the purpose of the law perhaps would be better met if works of art that cannot be reproduced through electronic means, such as paintings and sculptures, were excluded from exhaustion. Works that cannot be easily reproduced should be given more protection and should be excluded from exhaustion, as these are generally one-of-a-kind. Once the author parts with ownership of a unique and unreproducible work of art, s/he will no longer be able to benefit from any subsequent appreciation of its value.

(b) Classification by the way of making the copy available to the public

The Swedish Group opines that exhaustion of rights should not apply to all kind of works as regards:
a. making the copy available to the public through placing the copy on sale or display – exhaustion of rights for (i) all kind of works.
b. making the copy available to the public through rental – no exhaustion of right, except for (i) buildings, (i) works of applied art and (iii) art works.
c. making the copy available to the public through lending – exhaustion of rights, except for (i) computer programs and (ii) film works.

(iii) Digital copies
Some Groups suggest that digital copies should be treated differently. This point seems to be related to copies rather than works.

The Chinese Group opines that digital copies should be treated differently.

The Mexican Group opines that it is necessary to consider the existence of some exceptions for the exhaustion of rights by taking into account the nature of the work, its material support and the

ways in which the work can be transferred, reproduced, copied and/or distributed by the end user. Specifically, if a legislator decides to allow exhaustion with respect to digitally transmitted goods, it should be aware of the problems parallel imports may cause because the advantages of digital transmission, such as zero costs, equal quality and easy distribution may potentially increase parallel trade in online products. Some other groups seem to have similar views (2 Groups: Norway and Switzerland). The US Group favours exhaustion in analog or material copies, but does not take a position on digital copies.

b) Which right(s) should be exhausted?

(i) The right of distribution only

Most groups seem to opine that only the right of distribution should be exhausted (28 Groups: Belgium, Brazil, Bulgaria, Guatemala, El Salvador, China, Czech Republic, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, the Netherlands, Peru, the Philippines, Portugal, Republic of Korea, Romania, Russia, Singapore, Sweden, Switzerland, Turkey, the UK, Ukraine and the US).

There is no reason to extend the effects of exhaustion beyond the right of distribution (Belgium).

The Swedish Group opines that only the rights to publicly distribute the copy and publicly display the copy should be exhausted. The same rules should apply for exhaustion of rights to distribution and display in relation to neighbouring rights.

The Swiss Group notes that the right of distribution refers to transfer of a work, but also includes certain types of licences and any other method of putting in circulation copies of the work, either as tangible copies or through the internet.

(ii) Other rights as well

The Mexican Group opines that there are other rights than right of distribution that gradually should be extinguished, such as the right to prohibit the reproduction of the work, and other rights that shall be kept, such as the right to keep the integrity of the work in the original material support in which is contained and the right to destroy any other reproduction not contained in an authorised support.

The Norwegian Group notes that the right to lending should also be exhausted at least when it comes to certain kinds of works (typically applied art and buildings where it would seem unjustified that the rightholder could invoke his copyright). Furthermore, they assume that the right of reproduction should not be exhausted. Finally, they assume that there are strong practical needs for exhaustion of the right to adaptation and alteration for certain kinds of works (typically applied art and buildings, but also software).

The Venezuelan Group opines that only the right of distribution and lending should be exhausted.

c) What should be the requirements for exhaustion of rights to occur?

Many groups opine that the requirements for exhaustion should be (1) putting into circulation, or a (legitimate) sale or other transfer of copies, in a country or the European Economic Area in the case of EU countries; and (2) with the authorisation of the copyright holder (28 Groups: Belgium, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, Mexico, the Netherlands, Norway, Paraguay, Peru, the Philippines, Portugal, Republic of Korea, Romania, Russia, Sweden, Switzerland, Turkey, the UK, Ukraine, the US and Venezuela). The US Group indicates a legitimate sale of the copy.

The Belgian Group adds that some clarifications may be taken into consideration concerning the requirements. In particular, it could be specified that exhaustion will not operate if the copy has

been changed after it has been put on the market. Moreover, by analogy with trademarks, where the copyright holder has granted a license, it might make sense to list contractual provisions whose contravention might preclude exhaustion. The following provisions seem to be relevant in this respect: duration; quality of the reproduction of the work; quality of the goods incorporating the reproduction; scope of the goods for which the licence is granted; the territory where the work may be reproduced.

The Brazilian Group opines that the basic requirements should be: (i) the work must have been obtained legally; (ii) no conflicting contractual provision between the buyer and the author/copyright holder.

The Bulgarian Group opines that the requirements for exhaustion of rights to occur must be the explicit consent of the rightholder, the receipt of the adequate economic remuneration for the transfer of the ownership in the acquired original or its copy and an explicit guarantee that the acquired copy could not be multiplied by the acquirer when it is a subject of further resale.

The Egyptian Group seems to opine that the licensing of work by the rightholder may trigger exhaustion.

The Philippine Group opines that the author may increase protection contractually by entering into a contract to sell, wherein ownership is not vested in the transferee until payment of the purchase price.

The Singaporean Group states that the requirement is a simple one that the articles bearing the copyright work are made with the consent of the copyright owner in the country where the articles are made.

The Swiss Group opines that it should be more clearly defined what types of lending, licensing and leasing of copies of a work lead to exhaustion of copyright, making clear that any transaction that gives the acquirer permanent control (or practically permanent control in light of the expected lifetime of the copy) without legal obligation to return the copy (or where the obligation to return the copy has no practical meaning), against a consideration of which the rightholder was aware or had reason to know that it would be the compensation for the transfer of permanent control over the very copy, leads to exhaustion of copyright. This gives the secondary market for computer programs a firm legal ground and clear legal demarcation. Also the Copyright Act should state that the licensee benefits, under certain circumstances (e.g., as described in Question 8 or when the licensee deposits further periodic royalty payments), from an exhaustion of the right to use the copy of the work where the right of distribution is exhausted, which would have the result of making the licence immune from the bankruptcy of the licensor or the transfer of the underlying copyrights to a third party.

The UK Group indicates as requirements i) adequate consideration; ii) no right to call for return; iii) no restrictions on user type; and iv) a whole copy.

d) Should copyright be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price or similar circumstance?

(i) Yes (27 Groups)

The majority of the Groups opines that copyright should be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price (27 Groups: Brazil, Bulgaria, the Dominican Republic, El Salvador, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, Norway, Paraguay, the Philippines, Portugal, Republic of Korea, Russia, Singapore, Sweden, Switzerland, Turkey, Ukraine and the US).

Some Groups opine that only in case the buyer is a bona fide third-party, copyright should be considered exhausted (7 Groups: Brazil, Egypt, Estonia, France, Romania, Switzerland and the US). The Brazilian Group also notes that as this is a delicate matter, it should be assessed on a case-by-case basis.

The Swedish Group opines that exhaustion will occur only if the transfer of title has occurred.

The Estonian Group provides some reasons. That is, in the case where the (final) buyer according to the property law can keep the tangible object, it is reasonable that the distribution right also is considered to be terminated. This reasoning seems to be shared by the Japanese Group. This can be reasoned through the concept of legal certainty - third parties cannot be restricted in exercising the rights due to the circumstances unknown to them - which seems to be shared by the Norwegian Group.

Some Groups note that the copyright should be exhausted even in such a case to simplify and foster the commercial traffic (Italy) or to ensure stable, predictable, and secure transactional environment (Republic of Korea).

Some other Groups note that the copyright could be exhausted whenever the transfer of the ownership is realised, but the parties could agree on the moment when the ownership is transferred (upon delivering the goods, upon payment of the price) and in such cases the exhaustion will occur only once the contractually agreed transfer of the ownership happens (3 Groups: Australia, Bulgaria and the Philippines).

The Finnish Group notes that the question of validity of the rightholder's consent should be assessed on the basis of general contract law.

(ii) No (5 Groups)

Some Groups opine that copyright should not be exhausted if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price (5 Groups: Belgium, Guatemala, Peru, the UK and Venezuela).

The Belgian Group notes that as appropriate remuneration forms a part of the essential function of the copyright, it makes sense to treat the non-payment of the price of a copy as a valid reason to preclude exhaustion.

The UK Group points out that in contexts where the first seller has not received the economic value of the article, the rationale for exhaustion suggests that exhaustion should not apply. Nevertheless, it also opines that if the distribution right were not exhausted in circumstances where a sale was cancelled due to non-payment, a safe harbour for 'innocent' infringers should be introduced.

(iii) Others (3 Groups)

The Mexican Group opines that when the use of the copy of a work is subjected to a payment of royalties, the exhaustion of rights should be conditioned to such payment,

The Dutch Group notes that if the legal basis of the exhaustion is, later on nullified for some reasons so that the first sale never legally existed, the copyright should not be deemed exhausted.

The Canadian Group refrains from answering the entire Question 12.

International exhaustion (specific issue 1)
13) Should there be international exhaustion of copyrights?

(i) Yes (9 Groups)

Some Groups opine that there should be international exhaustion of copyrights (9 Groups: Argentina, China, Egypt, Japan, Portugal, Republic of Korea, Singapore, Sweden and Switzerland).

The Portuguese Group opines that international exhaustion of author's rights may bring economic advantages since works coming from outside the European Union are commercialised at lower prices. Moreover, globalisation and new technologies inevitably lead to the exhaustion of copyrights.

The Korean Group opines that as the market for copyrighted works is becoming globalised, more and more products incorporating copyrighted works are crossing national borders. To ensure stable, predictable, and secure international transactions, it is important not to restrain the free alienability of such products.

The Singaporean Group opines that copyright owners have already reaped the benefits of their exclusive rights by the commercial exploitation of their works. They should not be allowed to use copyright as subsequent barriers to the distribution and circulation of the copyright works.

The Swedish Group is of the opinion that there should be international exhaustion, not the least because of the globalized world in which works are distributed, whether on the Internet or otherwise, and the interest of ensuring legal certainty that the legitimate purchase of a copyright-protected work from a rightholder abroad will not be subject to the risk of infringement proceedings in the home jurisdiction by the national rightholder when the purchaser subsequently wishes to sell the work on their return.

The Swiss Group points out the positive economic but also socio-cultural impact of parallel imports for acknowledging international exhaustion.

(ii) No (19 Groups)

Some other Groups opine that there should not be international exhaustion of copyrights (19 Groups: Austria, Belgium, Brazil, Bulgaria, Canada, Czech Republic, Denmark. Estonia, France, Hungary, Italy, Latvia, the Netherlands, Paraguay, Peru, the Philippines, Romania, the UK and the US).

The Brazilian Group adds that some kinds of works do not admit international exhaustion of rights since it may hinder their commercial exploitation and business models (e.g., motion pictures).

The Bulgarian Group notes that international exhaustion of copyrights should be available only under the condition that there is a common territory such as the EU territory.

The Canadian Group examines the pros and cons of international exhaustion. They seem to be more inclined not to recognise international exhaustion. International exhaustion, in addition, can be harmful for consumers because once international exhaustion applies, a publisher may be reluctant to publish books at a lower price in a foreign market for fear of flooding the domestic market. The Hungarian Group and the Latvian Group seem to have a similar view.

Similarly, the French Group opines that regional exhaustion allows copyright holders to develop different marketing strategies according to the various different geographic markets where their works are sold, for example, by setting a sales price that takes into account the purchasing power of the people likely to buy a copy of the work, by offering works of varying levels of quality or in different formats, or in order to respect regional or national regulations on media chronology. The introduction of international exhaustion would remove this flexibility for the rightholders, while leading them to apply the same prices regardless of the place of sale of the work, at the expense of consumers in emerging countries. The ease with which copies of digital works can be made, and the quality of the copies, also make international exhaustion particularly dangerous for rightholders

since anyone could lawfully resell, on the Internet, a work purchased anywhere in the world.

Also, the UK Group notes that copyright affords a mechanism whereby the price of a product may be controlled to an extent by a manufacturer, subject to many other factors. This is necessary because economic conditions in national markets vary widely. If traders were able to arbitrage products between markets, global prices would tend towards an average. That would be advantageous to consumers in more developed economies but disadvantageous to those in less-developed economies.

The Danish Group opines that regional exhaustion provides a fair balance between the opposing interests.

The Dutch Group opines that choosing for international exhaustion will interfere with the protection mechanism of the internal market of the European Union which has been in place in the EU for decades and which has been included in the Copyright Directive as one of the pillars of the scope of protection of copyrights in the EU.

The US Group opines that copyright owners will only have the incentive to adapt copies and derivative works to local markets if they can be confident that such adapted works will not be exported into other countries whose consumers otherwise would have purchased higher quality and higher priced copies. Permitting copyright owners to price markets' copies differently (depending on, *inter alia*, the quality of the local copies) provides copyright owners with the incentive to provide such goods to developing nations.

(iii) Others (4 Groups)

The Finnish Group points out that Finland, like other Nordic countries, has traditionally applied international exhaustion.

The Norwegian Group opines international exhaustion is not only – or primarily – a copyright issue but an issue that raises questions of economics and trade policy, different legal systems, different levels of national wealth and development, state price controls and regulations and thus it questions whether it would be possible to introduce the principle of international exhaustion without at the same time also reaching agreement on other aspects of world trade.

The Mexican Group opines that the international exhaustion of copyrights should be considered only for some kinds of works and that works that naturally are supported in digital media should have different treatment in order to allow the holder of the rights to enforce them.

The Ukrainian Group is of the opinion that the regime of exhaustion of copyright should be determined under particular circumstances and policy considerations in each particular state in accordance with the national IP strategy.

On-line exhaustion (specific issue 2)
14) Should there be on-line exhaustion of downloaded copies? In your view, are downloaded copies fully comparable with copies stored on tangible data media?

[Comparability of downloaded copies with copies stored on tangible data media]

(i) Yes (Peru)

The Peruvian Group opines that downloaded copies are fully comparable with copies stored on tangible data media since the content remains the same.

(ii) No (20 Groups: Austria, Belgium, Brazil, Bulgaria, Canada, Denmark, Egypt, Estonia, Finland, France, Mexico, the Netherlands, Republic of Korea, Romania, Singapore, Ukraine, Sweden,

Switzerland, the UK and Ukraine)

The majority of the reporting Groups point out the differences between the two as below.

(1) No degradation after the use of copies (4 Groups: Belgium, Canada, France and Norway)

The Canadian Group points out that most notably in the case of physically manifested works, "used" versions of such works may show signs of obvious indications of wear and tear as compared to "new" copies thereof, whereas the very nature of digital works is that the "used" versions of same will show no signs of degradation as compared to the time they were first lawfully procured by their original recipients.

(2) Necessarily making a new copy when transferring a copy (5 Groups: Austria, Canada, Finland, the Philippines and Singapore)

The Austrian Group points out that the technical way of transmission follows the higher risk of counterfeits and a problem of ensuring authenticity.

The Belgian Group opines that the user of a downloaded copy can continue to use that copy, even after he has further "distributed" said (intangible) copy.

The Singaporean Group also points out that there is no sale as in a transfer of ownership but only a mere grant of a licence to use.

(3) Ease of transferring or making a copy and difficulty discerning if the person retains a copy or there is an infringement (6 Groups: Canada, Estonia, France, Mexico, the Netherlands and the Philippines)

Downloaded copies can be reproduced with relative ease and without much effort or cost after the first sale and then distributed among users/buyers from different parts of the world, whereas, the distribution of tangible goods is more easily controllable.

From an enforcement perspective, it is often very difficult to discern if an individual who purports to be "selling" a purchased digital file has or has not retained supplementary copies of equal fidelity for further use. There thus appears to be a materially higher risk that permitting digital exhaustion could incentivize an inefficient arms race where content owners impose stricter and more invasive TPMs or DRMs to control such practices. To be effective, such TPMs and DRMs might often raise significant privacy issues, as they would require monitoring of multiple devices on which copies of a downloaded work might reside. Even then, they would not necessarily be effective (Canada).

The Canadian Group opines that if an online market for selling "exhausted" copies of digital works were permitted to exist, it would clearly compete with the original market for such works in ways that are not analogous to the physical world. Tangible copies only exist in one place at one time, their physical substrates can degrade in quality, and they are difficult to reproduce. Digital "exhausted" copies could be sold to anyone in any place, with no real guarantee that any given vendor has truly purged all devices of the sold digital file. If, under the guise of permitting digital exhausted copies to be resold or otherwise transferred, multiple unauthorized copies of a work would in practice be retrained or reproduced, then a real risk of undercutting permanent, "rental", and streaming markets for works could materialize.

[Should there be on-line exhaustion?]

(i) Yes (11 Groups: Austria, Estonia, the Netherlands, Norway, Portugal, Romania, Sweden, Switzerland, the UK, Ukraine and Singapore)

Some Groups opine that there should be on-line exhaustion of downloaded copies.

The Austrian Group points out that considering the rapid technical development and the common practice to acquire copyright protected works by means of download, there is a need to regulate online-exhaustion.

The Dutch Group opines that the exhaustion of rights for works that are being distributed online is in line with the principles of free movement of goods and services. Furthermore, the rightholder would have an opportunity to seek additional remuneration on top of the compensation which he or she already obtained upon the first sale, which could be in conflict with the principle that the right owner must have the opportunity to obtain a reasonable compensation for his creative efforts. There is also a societal interest which could come into play when the rightholder decides to no longer make his work available. If it were possible in such a situation to freely redistribute second-hand copies of the work without intervention of the rightholder, the work would remain available to a larger part of the public, which could be considered beneficial for society as a whole.

The Norwegian Group points out, among other things, that if there were no on-line exhaustion, the right holder's position would de facto be strengthened to the detriment of the purchaser. For the purchaser also an investment in software (or another copyrighted work) will become a "sunk" investment, inter alia because there will be no "'second-hand" markets. In a broader context this is also part of a discussion regarding various kinds of digital rights management (DRM)-solutions that may have a lock in effect for end users. Also, the Group points out that the question of exhaustion of downloadable copies is in fact part of a broader discussion inter alia end user protection for works licensed online – whether downloadable or made available through some kind of streaming functionality because it will probably be fairly easy for rightholders to adapt to the ruling in order to avoid exhaustion by changing to:
- a subscription based model, where the right/licence would be granted for a specific time period (and not being perpetual as was the case in *UsedSoft v. Oracle*);
- streaming and/or cloud based arrangements, where the user gets access to the work without any downloading taking place, and where rights are granted for a limited time and/or upon the condition that the access is not sub-licensed.

The UK Group indicates a similar observation. The principle of exhaustion is designed to prevent unjustified monopoly control of intellectual property rights by rights holders and in particular (for the EU) prevent unjustified fragmentation of the internal market by restricting cross border trade. With appropriate conditions there is no reason that this principle cannot be applied to intangible forms in a way that does not undermine the existing justification and is future proof for developments in technology.

The Swedish Group opines that the difference between copies stored on tangible media (such as a CD or DVD) and downloaded copies is the method of distribution, whereas the economic transaction remains the same. The Romanian Group seems to have a similar view. The Swedish Group also points out that this is a reasonable and fair development of the principle of exhaustion, especially that sophisticated digital rights management (DRM) systems are available to rightholders and introducing a mechanism permitting the transfer of "purchased" digital works to a third party is not a technical impossibility today for the many digital online marketplace operators. The Swiss Group seems to have a similar view.

The Swiss Group also opines that on balance, accepting on-line exhaustion would lead to a more secure and more competitive digital economy.

The Singaporean Group opines that if we accept the argument that once copyright owners have reaped the benefits of their exclusive rights by the commercial exploitation of their works, they should not be allowed to use copyright as subsequent barriers to the distribution and circulation of the copyright works. Consequently, there is no reason why there should not also be online exhaustion of downloaded copies while the Group also indicates some differences with downloaded copies and copies stored on tangible data media.

(ii) No (13 Groups: Australia, Brazil, Canada, Czech Republic, Denmark, Finland, Hungary, Japan, Latvia, Paraguay, Peru, the Philippines and Republic of Korea)

Some Groups opine that on-line exhaustion of downloaded copies should not be recognised.

Some Groups indicate, as a ground for denying exhaustion of downloaded copies, that downloaded copies are not fully comparable with copies stored on tangible data media and thus online exhaustion of downloadable copies could pose a great danger of opening floodgates to copyright infringement. (7 Groups: Brazil, Canada, Denmark, Finland, Hungary, the Philippines and Republic of Korea). Whether or not downloaded copies are fully comparable with copies stored on tangible data media was discussed under a separate title above.

The Canadian Group points out that it may be inappropriate to apply the exhaustion doctrine to digital works, as the rationale for the first sale doctrine was meant to prevent copyright holders from controlling the subsequent sale or other distribution of the physical substrates with which the conventional copyright works were associated, while the Group notes that this question is difficult to answer with a simple yes or no.

The Finnish Group opines that as the downloaded copy is always a new digital copy of the downloaded work, the scope of on-line-exhaustion will therefore be broader than the scope of exhaustion of distribution right related to tangible copies since the latter is limited only to the redistribution of a particular copy sold or otherwise permanently transferred with the consent of the rightholder.

(iii) Others (on-line exhaustion to a limited extent or on some conditions) (5 Groups: Belgium, Bulgaria, France, Italy and Mexico)

The Belgian Group opines that the full equal treatment, conceived as a general rule, of both tangible and intangible copies is definitely not an acceptable solution because (1) in the *Usedsoft* judgment, the European Court of Justice itself seems to indicate that so-called intangible copies may be compared with tangible copies only in (very) specific situations; (2) more importantly, it should be kept in mind that the exhaustion cannot result in a limitation of the exclusive right of communication to the public, including the exclusive making available right; and (3) moreover, Directive 2001/29 itself states that "the question of exhaustion does not arise in the case of (…) on-line services (…) every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides". The French Group seems to have a similar view.

The Bulgarian Group opines that due to the fact that the downloaded copies are easily reproducible and difficult to control (especially when it comes to the territorial limitations of the first sale concept) the copyright holder should be guaranteed that his/her copyrights are not violated in applying the distribution right exhaustion concept and therefore, if on-line exhaustion of downloaded copies is provided for in the national legislations, explicit exceptions and limitations should be also stipulated in the respective legal frameworks so as to protect the essential absolute character of the copyrights worldwide.

The Italian Group opines that in order to preserve the good functioning of the copyright system in the on-line scenario, it deems that the principle of the exhaustion should apply in certain circumstances to the downloaded copies (only), provided that it is possible to apply technical measure that can actually prevent the free multiplication of the said copies by the buyer.

The Mexican Group notes that since the manner in which works contained in digital supports can be easily reproduced, copied, transferred, used and/or distributed, it shall be established in the Law that the original acquirer of the work in that digital support has to make their own copy unusable on resale, just as if the program was sold on in a tangible medium.

The US Group indicates that it does not take a position as to whether there should be on-line exhaustion of downloaded copies. They point out that there are many who believe the first sale doctrine for on-line or digital copies should be follow the common law principles of the first sale doctrine codified in the subsequent Copyright Acts while many others believe such a policy of on-line exhaustion of downloaded copies would create substantially more harm to copyright owners than provide any lawful benefit to consumers.

15) If there should be on-line exhaustion, under which conditions should different kinds of rights be exhausted? Should there be any differences between downloading a work and streaming it? Should rights be exhausted in a perpetual or non-perpetual licence? Should "re-sellers" of digital copies be allowed to further re-sell such digital copies? Should multi-user-licences be split up and sold separately?

(i) Under which conditions should different kinds of rights be exhausted in case of on-line exhaustion?

(a) Some Groups opine that on-line exhaustion, if any, should be limited, in particular, to those situations that are fully and indisputably comparable to the *Usedsoft* situation and it should be subject to the conditions mentioned by the European Court of Justice (3 Groups: Belgium, Bulgaria and the Netherlands). The Dutch Group summarised as follows:

- The distribution of the online copy can be viewed as a sale, which will generally be the case if the purchaser will receive a copy of the work which is meant to be stored on his computer or other data carrier. (note: the distribution of the online copy of the work will not be viewed as a sale in case the work consists of software or other digital work which is being made available in the frame of a service (e.g. streaming of content or the use of software 'in the cloud') which does not lead to the user of the service gaining possession of a copy of the software or other work); and
- upon the sale a licence is granted for an unlimited period of time or for a period that is equivalent to the normal life span of the work and for a one-time fee (representing the economic value of the copy of the work).

(b) Some Groups note that if there should be on-line exhaustion, only the distribution right should be exhausted (2 Groups: France and Romania).

The French Group points out two conditions: (1) a transfer of ownership of the copy or a perpetual licence by the rightholder; and (2) reseller does not keep a copy thereof. This opinion seems to be basically the same as the above (a).

(c) The Mexican Group points out that the exhaustion of rights should be conditioned to a payment of royalties.

(d) The Swiss Group proposes following tests:

(1) Whether a specific transfer exhausts the copyright should be assessed on a case by case basis based on the following cumulative conditions:

- Does the agreement provide for a one-time fee upon the transfer of the work?
- Does the agreement grant a perpetual right to use, i.e., a right that corresponds to the economic lifespan of the work?
- Does the consideration correspond to the economic value of one work copy?

(2) If these conditions are met, the following factors can further be assessed:

- Does the transferor retain any factual or legal control over the work copy?
- Does the transferee have an obligation to return the work copy?
- Does the agreement contain unilateral rights to terminate?

(e) The UK Group proposes the following conditions:

(1) adequate consideration:

the transfer of the article (not the intellectual property in that article but the article itself) is for consideration which represents the value of the article (i.e., it is not intended that additional consideration will be received by the seller for that article);

(2) perpetual use:
the article is intended to be used perpetually without fear of permission to use it being revoked;

(3) no right to call for return:
the seller has no right to call for the return or destruction of the article;

(4) no restrictions on user type:
there are no conditions as to the type of user of the article (such as a student); and

(5) a whole copy:
the purchaser has a copy of the whole of the article (whether tangible or intangible) that is more than temporary (i.e., not the copying of part of the article that takes place for the purposes of streaming).

(ii) Downloading v. Streaming

All the reporting Groups which address this issue seem to answer that there is no exhaustion in the case of streaming (14 Groups: Belgium, Bulgaria, France, Italy, the Netherlands, Norway, the Philippines, Portugal, Romania, Singapore, Sweden, Switzerland, the UK and Ukraine).

Some Groups opine that on-line exhaustion cannot be considered in the context of streaming as (1) on-line exhaustion has been considered in the context of downloading digital copies; (2) streaming does not imply the authorisation for the users of streaming services to use the work on a permanent and repeated basis (Belgium); (3) streaming does not involve transfer of ownership of the copy (the Philippines) or (4) streaming does not involve distribution but communication to the public (Romania).

(iii) Perpetual licence v. non-perpetual licence

(a) No exhaustion for non-perpetual licence (10 Groups: Belgium, Bulgaria, Finland, France, Portugal, Romania, Singapore, Switzerland, the UK and Ukraine)

Those Groups opine that on-line exhaustion does not seem conceivable in a non-perpetual licence.

(b) Exhaustion for non-perpetual licence (3 Groups: Egypt, the Netherlands and Norway)

The Dutch Group notes that it is probably fair to say that the exhaustion rule should also apply in case the use of the work is licenced for a period that is equivalent to the normal life span of the work and the fee that is paid upon the distribution represents the value of work or its use during this normal life span.

The Norwegian Group opines that one should consider going further and also apply exhaustion for non-perpetual licences, as this will prevent right holders from circumventing online exhaustion by operating with a licence term of, e.g., 99 years.

(iv) Further re-selling

(a) Yes (8 Groups: Belgium, Bulgaria, the Netherlands, Romania, Singapore, Sweden, Switzerland and the UK)

The majority of the reporting Groups who addressed this issue answered that resellers might be allowed to further resell digital copies only in those situations that are fully and indisputably comparable to the *Usedsoft* situation.

(b) No (2 Groups: Ukraine and Portugal)

The Ukraine Group opines that re-sellers of digital copies shall not be allowed to further re-sell such copies. The Portuguese Group states that resellers should be allowed to further resell digital copies only with the authorisation of the author/owner and he must erase the copy after its sale.

(v) Multi-user-licences

(a) No multi-user-licences (8 Groups: Belgium, Bulgaria, France, Latvia, the Netherlands, Romania, the UK and Ukraine)

Some groups simply deny this or state that where a licence is granted for a specific number of users, it may not be split up and "sold" separately. The UK Group points out that in case of multi-user licences the re-seller would retain a copy of the digital article after sale.

(b) Multi-user-licences in some situation (3 Groups)

The Norwegian Group points out that if the principle of exhaustion is recognised it is somewhat difficult to see why multi-user licences are not also allowed to be split up and sold separately. The Portuguese Group states that multi-use licences should be allowed only if the computer program per se permits this. The Swiss Group opines that multi-user "licences" that can be qualified as a transfer of control over multiple copies should be able to be split up and sold separately, whereas a transfer of control over one copy with multiple user right rights should.

(c) Not applicable/no comments

Many Groups refrain from answering this Question 15. Some Groups explicitly indicate that this question is not applicable to them or does not have to be answered (6 Groups: Brazil, Czech Republic, Denmark, Hungary, Japan and Republic of Korea).

The Canadian Group states that they do not recommend digital exhaustion without further study including analysis of the market effects of such a change.

The US Group does not take a position as to whether there should be on-line exhaustion of downloaded copies and thus has not developed a consensus on these questions.

16) Should a distinction be made for each type of copyright-protected work (e.g. computer programs, music, books and films)?

Although this question was asked in the context of on-line exhaustion, some Groups which deny on-line exhaustion also answered this question, meaning that some Groups answered this question in a broader context, that is in the context of exhaustion of distribution right in general.

(i) Yes (9 Groups: Austria, Belgium, Bulgaria, Denmark, Egypt, Hungary, the Netherlands, the Philippines and Russia)

The Philippine Group opines that computer programs are of a peculiar form, considering that the value is derived from its use and application. Hence, higher protection should be afforded the authors to ensure that the transferee will not retain use of the same, and at the same time derive income by its subsequent sale to a third party.

(ii) No (16 Groups: Australia, Canada, Finland, France, Japan, Mexico, Norway, Paraguay, Peru, Portugal, Romania, Singapore, Sweden, Switzerland, the UK and Ukraine)

The Canadian Group points out that if a work, for example, could be at once a computer program, a musical work, a book and a film (as is possible with enhanced feature film "extras" packages),

then categorical distinctions between how the various types of works are treated for exhaustion purposes would increase confusion rather than promote clarity in the law.

The French Group states that as long as the conditions mentioned in the answer to Question 15 are met, there is no reason to distinguish between different types of copyright-protected works. However, as stated above, there is a need to provide technical means to ensure that the seller does not retain a copy of the work sold.

Although the Norwegian Group generally agrees that the same regime for exhaustion should apply to all kinds of works, they also point out that allowing exhaustion to take place for software that have been "bought" (downloaded) would perhaps not have any impact on software vendor income, as the vendor still would get income from a support and maintenance contract – which the second hand buyer of software would in fact be "forced" to enter. This is not the case with other kinds of works (e.g., books or movies). The UK Group also indicates a similar point.

The UK Group proposes that the conditions of exhaustion be clarified and universalized for all types of copyright works whether distributed online or via physical media. The market can then be left to set the appropriate conditions of dissemination for different types of copyright works. For certain works, such as e-books, a personal licence, limited term licence or streaming model may be required to enable products to be priced appropriately.

(iii) Not applicable or no comments (4 Groups: Brazil, Czech Republic, Republic of Korea, and US)

The US Group does not take a position as to whether there should be on-line exhaustion of downloaded copies and thus has not developed a consensus on this question.

Exhaustion of copyright-protected works in case of recycling or repair of goods (specific issue 3)
17) To what extent should one be able to recycle or repair goods which are copyrightable works without infringing (1) the right of reproduction, (2) the right of adaptation, arrangement and other alteration rights; and (3) the right to integrity?

(i) Special treatment or no special treatment

(a) No special treatment (7 Groups: Czech Republic, Finland, France, Italy, Norway, Sweden and Switzerland).

It seems that many Groups take for granted that a special treatment is not necessary in the case of repair or recycling by the lawful owner of goods. As it is generally considered that only the right of distribution is exhausted by the first sale of a copy, the exhaustion of copyright (i.e., the right of distribution) is irrelevant when deciding the infringement of rights other than the right of distribution, such as (1) the right of reproduction, (2) the right of adaptation, arrangement and other alteration; and (3) the right to integrity (the "Three Rights"). Some Groups specifically note that repair or recycling of goods is not an issue of exhaustion of copyrights (3 Groups: Czech Republic, Finland and Italy).

The French Group explicitly states that they do not advise introducing a special exception to the author's monopoly in the case of repair or recycling of goods constituting original works, even if the right of distribution of these works is exhausted. The Portuguese Group states that one should be able to recycle or repair goods without infringing the Three Rights with the consent of the author of the work.

Some Groups opine that it should be possible to recycle or repair goods which are copyrightable works, in accordance with what is possible today (3 Groups: Sweden, Norway and Switzerland).

(b) Establishment of an exception (3 Groups: Mexico, Romania and Brazil)

In contrast, the Mexican Group proposes that an easy way to solve this matter would be to establish as an exception of infringement for actions directed to keeping the integrity of the work, including the repair or recycle of the goods, taking into account the nature of the work and the material support.

Also, the Romanian Group opines that with respect to the right of reproduction of copyrightable works and the right to create derivative works, the same principles should apply as set forth in AIPPI Resolution Q205 for patents and designs, as follows:

i. Repair of a copyrightable work, including maintenance work and minor interventions, should not constitute infringement. If the distribution right in such a work is exhausted before repair the right should be exhausted after repair.
ii. Reconstruction of a copyrightable work, which involves changing or reproducing an essential component of such work should constitute infringement. The principle of exhaustion should not apply to such reconstructed product.
iii. Recycling of a copyrightable work (where this involves acts whereby works that have served the use for which they were conceived are reused without being reduced to their constituent ingredients) should be addressed within the context of whether such recycling constitutes repair or reconstruction of such work.

The Brazilian Group points out that it is important that recycling and repair of protected goods be carefully included in copyright law in order to be considered as exceptions to copyright.

(ii) With respect to the Three Rights

Some Groups discussed all the Three Rights together in their answers to Question 17.

(a) All the circumstances

Some Groups point out that each repair case should be decided on a case-by-case approach in view of all the individual circumstances including the respective type of work and the normal lifetime of the goods and the solution should strike a fair balance between the rightholder and the legitimate owner of the copy (3 Groups: Austria, Belgium and Canada).

(b) Three-Step Test

Some Groups opine that the free utilization of the work in order to recycle or repair copies of copyrightable works should be limited by keeping in mind the three-step test set forth by Article 9(2) of the Berne Convention and Article 13 of the TRIPs, namely (1) it is in certain special cases; (2) it is provided that it does not conflict with a normal exploitation of the work; and (3) it does not unreasonably prejudice the legitimate interests of the author (Italy). The Japanese Group notes that at least media conversion of works (e.g., from VHS to DVD) should be permitted to the extent that the three-step test is met.

(c) Extent

Some Groups try to specify the extent to which one should be able to recycle or repair goods which are copyrightable works without infringing the Three Rights.

The Belgium Group opines that any action beyond mere maintenance work and very minor interventions is likely to infringe the Three Rights.

The Bulgarian Group opines that a consumer should be able to recycle or repair goods which are copyrightable works without infringing the Three Rights to the extent that the copyrighted work itself is not altered, adapted or otherwise impaired and that the consumer should remain to be

provided with the right to destroy a copyright-protected work in case he/she is a legal acquirer/proprietor of the original of the work or a copy thereof (books, CDs, DVDs, etc.).

The Swiss Group opines that repairs should be possible provided they are carried out competently and do not affect the individual character of the work or carried out for private use and that recycling of a work where alteration of the original is involved requires consent of the rightholder, whereby the new creation may itself enjoy copyright protection.

The Turkish Group opines that to the extent that a recycle or repair is considered technically indispensable, the recycle or repair by a person who lawfully purchases goods should be admissible.

The US Group opines that as long as the recycling or repair of a good does not create a derivative work, AIPPI-US does not favour any limits on recycling or repairing goods.

(iii) With respect to each of the Three Rights

Some Groups individually discuss each of the Three Rights in answering this question 17.

(a) Reproduction Rights

The Danish Group indicates that if the recycling (reuse) or repair means that a copy of the copyright protected work is created, the new copy should be infringing the rights of the copyright-holder, even if the original is discarded.

The Egyptian Group opines that it shall not constitute an infringement of the right of reproduction if the reproduced work is not substantially different from the original work.

The Korean Group indicates that so long as repairing or recycling the goods does not affect the new demand for the copyrighted work, then there will not be an infringement on the copyright holder's right of reproduction.

(b) Alteration Right

The Danish Group opines that if the adapted work represents a new and independent work, it should not infringe the alternation right.

The Egyptian Group opines that with respect to the right of adaptation, arrangement and/or alteration should not be an infringement of the right of adaptation if the characteristics of the work are not altered.

The Korean Group opines that unless the act of repairing or recycling affects the contents of the copyrighted work, there should be no infringement of the copyright holder's right of adaption, right of arrangement, and other alteration rights.

(c) Moral Rights (Right of Integrity)

Some Groups point out that the recycling or repair of goods which are copyrightable works may not be accepted without infringing the moral right of integrity of the work unless the author grants his/her consent (4 Groups: Brazil, Finland, the Netherlands and Ukraine).

Some Groups note that goods which are copyright-protected works may be recycled or repaired without infringing the right of integrity to the extent that it is not, to the prejudice of its author's honour or reputation, distorted, mutilated or otherwise modified (4 Groups: Canada, Denmark, Romania and Turkey).

Also, the Danish Group opines that buildings and utilitarian articles may be altered by the owner without the consent of the author if this is done for technical reasons or for the purpose of their practical use.

The Czech Group opines that this is a very complex question which is not a part of the exhaustion doctrine as such but it is rather a matter of interpretation of moral rights of the author. The limits of moral rights must be set by case law, e.g., architectonic works should require a slightly different approach than purely artistic works.

The Philippine Group opines that any recycle and repair should be limited to restoration and preservation of the work in its original form. Otherwise, the authorship will be jeopardized.

The Korean Group opines that if the extent of repair or recycling rises to the level beyond simple correction of typographical or syntax errors, and if it can be deemed that the resulting work is a reproduction or a derivative work of the original, then such repair or recycling will infringe the right of integrity of the copyrighted work.

(d) Difference between repair and recycling

Some Groups note differences between repair and recycling.

As noted above (ii)(c), the Swiss Group treats repair and recycling differently.

The Brazilian Group indicates that the difference between repair and recycling must be clearly established, since the first generally aims to re-establish the work's status quo; whereas recycling might cause the destruction or considerable modification of the work, which shall always be preceded by the author's or copyright holder's authorization.

The UK Group states as follows:

(1) Recycling. They consider that recycling should normally be permitted by economic copyright within a region where economic conditions are broadly similar, bearing in mind the general desirability of conserving the Earth's resources. Moral rights (right of integrity) and trade marks should be used to protect the reputation of an author or trade mark owner if it is jeopardised in the circumstances. However, copyright owners should be permitted to resist the movement of copies of their copyright works (whether recycled or not) from areas in which much lower prices prevail to areas in which higher prices prevail, so that they can make their products available at lower prices in markets where higher prices cannot be afforded, thereby achieving a more efficient allocation of economic resources.

(2) Repair. They consider that the copyright owner should be able to invoke copyright in relation to repairs of products which involve reproduction of a protected work or part of a work, if it wishes to do so. It should be able to decide in the context of the nature of the product, the market, the competition and its overall commercial strategy what approach is in the best interest of its stakeholders and its customers.

III. Proposals for harmonisation

[Questions 18 through 21]

Some Groups provided common answers for Questions 18 through 21.

Some Groups opine that harmonisation is generally desirable for Questions 18 through 21 as in other areas of laws (Argentina).

The Bulgarian Group opines that the harmonisation that covers four criteria (the requirements,

international exhaustion, online exhaustion and exceptions) is recommendable for the following reasons:
(1) To avoid impeding the legal circulation and free international trade with copyright-protected goods;
(2) To protect copyright holders internationally from violations of their distribution rights due to differences and collisions in the legal framework as regards the requirements for the application of the exhaustion of rights concept;
(3) To eliminate wrongful and contradicting interpretations by the competent enforcement and judicial authorities in each country as regards the application of the exhaustion of rights concept.

The Chinese Group seems to indicate that harmonisation is desirable in a way as their proposals for improvements of the current law as described in their answers to Questions 12 through 17.

No Comments were provided by some Groups (5 Groups: Austria, Belgium, Canada, Uruguay and Venezuela). We may be able to assume that they view that harmonisation is desirable in line with their proposals as described in their answers to Questions 12 through 17.

18) Should exhaustion of rights as set forth in Question 12 above generally be harmonised? Please provide your reasons.

(i) Yes (20 Groups: Australia, Bulgaria, Egypt, Finland, France, Italy, Japan, Latvia, Mexico, Paraguay, the Philippines, Portugal, Republic of Korea, Romania, Russia, Singapore, Sweden, Switzerland, Turkey and US)

The Finnish Group opines that harmonisation should promote global free trade of goods, freedom of expression and access to information.

The French Group opines that disparities between national laws as regards the definition of exhaustion are likely to strengthen the arguments regularly raised in opposition to the recognition of the exclusive rights of authors over their works, especially in the case of authentic works, which have been lawfully acquired by a transferee.

The Italian Group opines that the exhaustion rules should be generally harmonised, in order to avoid differences that could harm the international commerce of cultural goods.

The Latvian Group opines that Copyright protected works easily cross borders and harmonisation is an essential tool for protection of rightholders.

The Mexican Group opines that harmonisation will provide legal certainty to all of the parties involved in the situation.

The Philippine Group opines that exhaustion of distribution right should be harmonised so that conflicting rules and doubt as to the applicable governing rules are avoided.

The Portuguese Group opines that it is important, in this digital age and with a market economy, that the exhaustion of rights of author's rights be duly harmonised in order to guarantee a greater economic balance for authors, irrespective of their nationality.

The Korean Group opines that as the market for copyrighted works is becoming globalised, more and more products incorporating copyrighted works are crossing national borders and thus if the territorial principle of copyright law was strictly applied and undermined the protection of the copyrighted works in the international context, or if the copyrighted works were protected only in a few countries, then such copyright regime would threaten not only the rights of the author but also the stability, predictability, and security of international transactions and undermine the free movement of copyrighted works.

The Russian Group opines that as a first step the exhaustion of rights as set forth in Question 12 above should generally be harmonised with Internet activities in view of the fact of its global nature.

The Swiss Group opines that harmonisation is desirable for works in a moveable form, as the market for such works is international. However, harmonisation is not considered to be required for architectural works.

(ii) No (5 Groups: Brazil, Denmark, Hungary, Peru and Ukraine)

The Brazilian Group opines that, as set forth in Article 6 of the TRIPs, each signatory country is entitled to regulate exhaustion of rights.

The Danish Group opines that the existing legal position provides sufficient harmonisation, and allows for local deviations.

The Peruvian Group opines that the rightholder should always decide on the extent of distribution of its copyrights.

The Ukraine Group points out that, for example, the requirements for exhaustion to occur and the consequences of cancellation of the first sale cannot be harmonised as these legal issues are related to other legal notions, such as first sale and purchase in good faith, which are specific to each legal regime. At the same time, the rights to be exhausted and the kinds of works for which exhaustion shall occur can be harmonised on an international/regional level.

(iii) Others

Some reporting EU countries view that only harmonisation in the EU/EEA region is necessary or desirable and it is not necessary or desirable worldwide (3 Groups: Czech Republic, Estonia and the Netherlands). The Dutch Group states that the single market does not function properly in case different regions within the market have different exhaustion rules which generally are considered to be disadvantageous for right holders.

The UK Group points out that whether exhaustion should apply is a context-specific balancing exercise between competing interests, and it could thus be difficult to provide for harmonised solutions to that balancing exercise that would be appropriate for the circumstances within each contracting state. It also states that there are benefits of harmonisation - whether or not the harmonised position is that exhaustion should apply equally across all contracting states. For example, it would assist rightholders to set consistent prices across contracting states, as they would be able consistently to price in (or not) the effects of resale into their sales prices.

19) Should international exhaustion of rights be harmonised or not? Please provide your reasons.

(i) Yes (15 Groups: Australia, Bulgaria, Egypt, Finland, Mexico, Paraguay, the Philippines, Portugal, Republic of Korea, Russia, Singapore, Sweden, Switzerland, the UK and the US)

The Bulgarian Group opines that the exhaustion of rights should be generally harmonised in relation to the international exhaustion of rights taking into account that such exhaustion is an exception from the territorial principle of the first sale concept rather than a general rule.

Some Groups opine that the harmonisation should promote global free trade of goods, freedom of expression and access to information (2 Groups: Finland and Switzerland). Similarly, the Philippine Group notes that nowadays, trade and business are highly globalised such that there are currently numerous and different inter-jurisdiction transactions being conducted. If the rules on international exhaustion of rights are not harmonised, there may be conflicting provisions. As a result, there will undeniably be difficulty in enforcing one’s intellectual property rights.

In a similar vein, the Swedish Group points out that due to the global market and today's mobility of both consumers and goods, it is likely that consumers generally appreciate that the exhaustion of copyright (and related rights) is global and not regional. Moreover, it is difficult to control the observance of the rules on regional exhaustion, thus, regional exhaustion may give the rightholders a false sense of security. With harmonised international exhaustion of rights, rightholders would instead set their prices and strategy taking regard to the disposals after the first sale that the global market makes possible.

Some Groups point out that the harmonisation will provide legal certainty to all of the parties involved in a global digital world (3 Groups: Mexico, Portugal and Republic of Korea).

The Singaporean Group adds that harmonisation will be difficult to achieve given the different views taken by different jurisdictions.

The UK Group states that harmonisation is desirable provided that the harmonised position is that there is no international exhaustion of rights, save as may be agreed now or in future under international treaties establishing economic alliances such as the EEA. By this they mean that international resales should not be permitted but that all individual purchasers should acquire the same rights with respect to a lawfully acquired copy of a work no matter which jurisdiction they happen to acquire it in. Similarly, the US Group favours harmonising laws that restrict international exhaustion of rights because it provides the certitude necessary to content providers to adapt their products for local markets.

(ii) No (13 Groups: Brazil, Czech Republic, Denmark, Estonia, France, Hungary, Italy, Japan, the Netherlands, Norway, Peru, Romania and Ukraine)

Some Groups seem to be against the harmonisation in respect of international exhaustion because they are against international exhaustion (3 Groups: Brazil, Latvia and the Netherlands).

The Brazilian Group opines that harmonisation in respect of exhaustion is against the TRIPs.

Some Groups view that it is not necessary (3 Groups: Estonia, Japan and the Netherlands).

The Danish Group points out that jurisdictions can have many different ways of striking a balance between the interests of the rightholders and the interests of the users and thus, the relevant jurisdiction shall be allowed to decide whether international exhaustion is allowed.

Some Groups opine that harmonisation is not practicable given the great difference among countries in their approach to international exhaustion (3 Groups: Japan, Czech Republic and Norway). The Japanese Group adds that rather, it seems desirable to keep the status quo and allow each country to freely decide on approaches to the question of international exhaustion from the viewpoint of cultural protection, etc.

In this connection, the Norwegian Group notes that the question of international exhaustion is a complex question that also raises questions of economics and trade policy, different legal systems, different levels of national wealth and development, state price controls and regulations. The Romanian Group and Ukrainian Group seem to have similar views.

The Peruvian Group opines that by all means the aim is to avoid the creator/titleholder of a copyright competing against itself because of parallel imports or re-sales.

The Italian Group opines that general harmonisation should not provide for the international exhaustion.

The French Group is not in favour of international exhaustion of copyright. However, the French

Group does believe that countries that want to create a single market with, in particular, free movement of goods, should be able to provide for regional exhaustion by multilateral agreements.

20) Should on-line exhaustion of rights be harmonised? Please provide your reasons.

(i) Yes (20 Groups: Bulgaria, Egypt, Finland, France, Italy, Japan, Mexico, Norway, Paraguay, the Philippines, Portugal, Republic of Korea, Romania, Russia, Singapore, Sweden, Switzerland, the UK, Ukraine and the US)

Some Groups opine that online exhaustion should be harmonised for the benefit of both rightholders and users/consumers to allow for efficient transactions, because the Internet allows works fixed on intangible media to be easily distributed worldwide (7 Groups: France, Norway, the Philippines, Portugal, Republic of Korea, Singapore and the US).

The French Group notes that, in the interests of rightholders, there is a need to find a technical solution that enables them to ensure, in particular, that in the event of the transfer of the media holding their work, the seller does not retain a copy of the work transferred. Thus, online exhaustion of copyright should be harmonised when there will exist technical (or legal) tools to ensure the compliance with the limits thereof.

The Finnish Group also points out that (1) the ECJ's ruling in *UsedSoft v. Oracle*, which inevitably has caused concern as to what is in fact the current state of law when it comes to online exhaustion, in itself calls for harmonisation; (2) it would benefit at least the users in terms of lower prices, quality, diversity and affordability to have a harmonised framework; and (3) the harmonisation for removing barriers on a cross border trade also would be beneficial to foster more small and medium sized businesses since very limited transaction costs are associated with online distribution.

The Philippine Group opines that online exhaustion of rights should be also harmonised on the ground that since it entails inter-jurisdiction transactions (i.e., the transfer of tangible or intangible goods from one country to another), different intellectual property rules of one country with another might result in difficulty in enforcing one’s intellectual property rights. These conflicting rules might unduly hamper the easy-going transfer of property rights from one person to another in such a way that more time and more costs/expenses will be spent by the people in enforcing their intellectual property rights.

The UK Group opines that the law should be harmonised such that the right to distribute all copyright works online is exhausted after first transfer of ownership in accordance with the conditions set out in Question 15 within the relevant territory. Where copyright works are to be disseminated otherwise than by way of transfer of ownership, the conditions of dissemination and restrictions on further resale should be made very transparent. This should clarify the position for businesses and consumers worldwide and make distribution of copyright works easier to police.

The Romanian Group opines that on-line exhaustion for downloaded copies should be harmonised, considering that both downloaded copies and tangible data media represent storage means for the copyright-protected works and the principle of exhaustion of the distribution right upon the original or copies of a work should be applicable without making any difference whether the work is made available by the rightholder by means of download or by means of tangible data media, especially considering the latest economic developments regarding the on-line medium.

On the other hand, some Groups report that exhaustion should be harmonised so that there is no on-line exhaustion (2 Groups: Finland and Japan). The Finnish Group notes that on-line exhaustion would mean exhaustion of communication right and related reproduction right and it would thus be much broader in its scope than the exhaustion of distribution right. On-line exhaustion would have severe impacts on digital markets, conflict with a normal exploitation of works and unreasonably prejudice rightholders’ legitimate interests.

The Bulgarian Group opines that taking into account the trans-continental scope of the Internet when a copy of a copyright-protected work could be downloaded at the same time from users in different continents and countries, the rules to apply on-line exhaustion of rights in digital copies should be harmonised in a manner to avoid harmful circumvention of the territorial limitations of the exhaustion.

The Mexican Group points out that the harmonisation will provide legal certainty to all of the parties involved.

The Ukraine Group opines that for the copyrighted works to be easily distributed on-line, the basic principles of exhaustion should be imminently harmonised as more and more copyright protected works are distributed through the Internet although all aspects of on-line exhaustion cannot be harmonised as such harmonisation would require approximation of various areas of law, including some legal issues of contractual law, e-commerce, etc.

(ii) No (6 Groups: Brazil, Czech Republic, Denmark, Estonia, Hungary and Peru)

The Brazilian Group opines that, in principle, online exhaustion should not be harmonised, while it is difficult to regulate online exhaustion locally since there are no boundaries for the online environment.

The Danish Group opines that the Information Society Directive already provides an acceptable legal position in this respect. However, it should be made clear that neither the Computer Program Directive nor the Information Society Directive provides for online-exhaustion of downloaded copies.

(iii) Others

(a) EU-wide harmonisation (the Netherlands)

The Dutch Group opines that there are several good reasons for a need for harmonised rules within the EU:
- the Internet is a worldwide network with no borders;
- the right of distribution has already been harmonised within the EU, so the same should be done with online exhaustion. If this is not achieved, it could result in leakage of the harmonised EU system and disparity of protection, which easily gives rise to obstacles to the free movement of works in the online world.

(b) Nothing to harmonise (Latvia)

The Latvian Group opines that as distribution is performed when original or copy of the copyright or neighbouring rights object is sold or otherwise alienated, which is impossible on-line, there is nothing to harmonise.

21) Should exhaustion of rights in case of recycling and repair of goods be harmonised? Please provide your reasons.

(i) Yes (12 Groups: Egypt, Finland, Latvia, Mexico, Paraguay, the Philippines, Portugal, Republic of Korea, Romania, Russia, Turkey and US)

The Korean Group opines that similar reasons as those given in response to Q18 would also apply to exhaustion of rights in case of recycling and repair of goods.

Some Groups point out here, too, that the harmonisation will provide legal certainty to all of the parties involved in a global digital world (3 Groups: Mexico, the Netherlands and Portugal).

(ii) No (7 Groups: Brazil, Czech Republic, Denmark, France, Hungary, Italy and Peru)

The Czech Group opines that this question is closely connected with the doctrine of moral rights and, due to the differences between civil law and common law systems in general, harmonisation of this issue is not achievable at the time being.

Similarly, the French Group is in favour of harmonising exhaustion except in the case of repair and recycling because exhaustion, as an exception to copyright, should not cover the repair or recycling of goods. The author should be permitted to oppose the repair or recycling of a work where such repair or recycle infringes his/her right of reproduction over the work or his/her moral rights, in particular the right to integrity of the work.

The Danish Group opines that at this point there is no reason to believe that matters relating to recycling and repair of goods have a significant cross border impact to justify further harmonisation.

Some Groups view that as recycling and repair of goods is not a matter of exhaustion, it should not be discussed in the context of harmonisation of exhaustion (2 Groups: Italy and Ukraine).

(iii) Others

(a) EU-wide harmonisation (2 Groups: Estonia and the Netherlands)

It seems that the Dutch Group favours EU-wide harmonisation with respect to this issue, also.

(b) Hamonisation for media conversion of works (Japan)

The Japanese Group views that, in an internationally harmonised manner, media conversion of works should be permitted to the extent that the three-step test (under Article 9(2) of the Berne Convention) is met. To this extent, it does not seem difficult to reach a consensus among the countries.

(c) Harmonisation not by extending the scope of exhaustion (Finland)

The Finnish Group opines that it is reasonable to harmonise possibilities to recycle and repair of goods but not by extending the scope of exhaustion. Instead, the Finnish Group recommends specific limitation provisions for these purposes.

(d) Harmonisation for repair only (2 Groups: Switzerland and the UK)

The Swiss Group does not see a requirement for rules of exhaustion in case of recycling and accordingly no requirement for harmonisation. For repair, they propose that harmonised rules be adopted to permit repair of copyrighted works, provided the repair does not affect the individual character of the work.

With respect to recycling, the UK Group considers that harmonisation would have marginal impact, provided that it did not enable a substantial trade between different economic regions undermining desirable price discrimination between substantially different markets. With regard to repair, they think that harmonisation is desirable, since the efficiency of manufacture of replacement parts may be promoted by economies of scale and global competition. Harmonisation will facilitate decisions by copyright owners as to how best to use their copyright in the interests of their stakeholders and customers.

III. Conclusions
(i) Analysis of current law and case law

Almost all the reporting Groups (36 Groups out of 42 Groups) report that they recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT. Most reporting countries (33 Groups) have specific provisions for the right of distribution.

The vast majority of the reporting Groups (34 Groups) reports that their copyright laws recognise the exhaustion of copyright after the first sale of the work with the authorisation of the author. In most reporting countries (33 Groups), it is provided by statutory law.

In many reporting countries, exhaustion of rights in the case of a transfer of copies of the work in a tangible form essentially occurs for all kinds of works (32 Groups). In most reporting countries (29 Groups), only (a) the right of distribution is exhausted in principle, while neither (b) the right of reproduction nor (c) the right of lending and/or renting of copies is exhausted.

The vast majority of the Groups (33 Groups) reports that the requirement for exhaustion of rights is (1) putting into circulation, or a sale or other transfer of copies in a country (or the European Economic Area in the case of EU countries) (2) with authorisation of the copyright holder. The majority of the reporting Groups (24 Groups) reports that in the case where the rightholder A distributes lawful copies to people including B, B sells it to C, and thereafter A cancels the sales agreement between A and B due to non-payment of the price by B to A, A may not assert his/her copyright against C.

Many reporting Groups (23 Groups) state that there are no specific statutory exception regarding transformation of the work or a copy distributed with the consent of the rightholder, but it seems that the author shall have the right to authorise or prohibit the adaptation of the work and moral rights in most reporting countries (29 Groups).

Although some Groups (12 Groups) point out that the exhaustion of rights may be waived contractually, other Groups (12 Groups) point out that the exhaustion of rights may not be waived contractually. Some Groups clarify that although the exhaustion of rights may be waived contractually, such a contract does not prevent the exhaustion of right from occurring in connection with a third party, that is, a third party may rely on the exhaustion of the rights against a claim by the rightholder.

Rationales for the exhaustion of rights are as follows:

- Free movement of goods (5 Groups) or the balance between the free movement of goods and the interests of the rightholder (19 Groups)
- Rightholder having an opportunity to receive compensation for his/her work during the first sale or transfer of a particular copy (6 Groups)
- Respect of Ownership rights (7 Groups)
- Building a secondary market (3 Groups)
- Competition (5 Groups)
- Harmonisation (7 Groups)

With regard to international exhaustion, 17 Groups recognise regional exhaustion (EU/EEA), 11 Groups recognise international exhaustion generally, or to some extent, while seven (7) Groups do not recognise international exhaustion at all. As a rationale for international exhaustion, some Groups note that as increasingly large quantities of copyrightable works are widely distributed across the national border with the advance of economic globalization, it is reasonable to meet the need to ensure smooth distribution and safety of transactions in the context of international transactions.

With respect to on-line exhaustion, it is recognised for at least computer programs in EU/EEA countries and it is probably recognised in seven (7) non-EU/EEA reporting countries, while it is probably not recognised in seven (7) non-EU/EEA reporting countries. Seven (7) other non-EU/EEA Groups report that how it will be treated is unknown. Among EU/EEA reporting countries,

(a) almost all Groups report that on-line exhaustion will not be found in non-perpetual licence case; (b) all the Groups answering the question report that the resellers of digital copies are allowed to further resell such digital copies under the circumstances described in *Usedsoft*; (c) almost all the Groups answering the question report that in view of the *Usedsoft* decision, multi-users-licences cannot be split up and sold separately. Also, among EU/EEA reporting countries, eight (8) Groups seem to report that there is no objective specific basis that would distinguish the types of work in the admissibility of on-line exhaustion, while four (4) Groups seem to report that complex works that cannot be reduced to their computer program dimension appear to be subject to the general exhaustion regime, which expressly excludes the possibility of invoking exhaustion in respect of intangible copies. These issues are also discussed by non-EU/EEA reporting countries, but it seems difficult to show a general tendency.

With regard to exhaustion of copyright-protected works in case of recycling and repair of goods, 11 Groups report that the Three Rights (defined in Question 11) are not exhausted after the first sale of goods and thus reproduction and/or adaptation of goods must be conducted with the consent of the rightholder or the author. Nine (9) Groups report that goods may be recycled or repaired without infringing the right of integrity to the extent that it is not, to the prejudice of its author's honour or reputation, distorted, mutilated or otherwise modified.

(ii) Policy considerations and proposals for improvements of the current law (harmonisation part)

The vast majority of the reporting Groups (28 Groups) opines that exhaustion of rights should occur for all kinds of works.

The vast majority of the reporting Groups (28 Groups) opines that only the right of distribution should be exhausted.

The vast majority of the reporting Groups (28 Groups) opines that the requirements for exhaustion should be (1) putting into circulation, or a (legitimate) sale or other transfer of copies (2) with authorisation of the copyright holder.

The vast majority of the reporting Groups (27 Groups) opines that copyright should be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price.

International exhaustion is highly controversial; some Groups (9 Groups) opine that there should be international exhaustion of copyrights; while other Groups (19 Groups) opine that there should not.

On-line exhaustion is another highly controversial issue; some Groups (11 Groups) opine that there should be on-line exhaustion of downloaded copies, while other Groups (13 Groups) opine that on-line exhaustion of downloaded copies should not be recognised. Also, all the reporting Groups which addressed streaming seem to be of the opinion that there should be no exhaustion in the case of streaming (14 Groups). Ten (10) Groups opine that on-line exhaustion does not seem conceivable in a non-perpetual licence, while three (3) Groups opine that there should be on-line exhaustion for non-perpetual licences. Eight (8) Groups answer that resellers might be allowed to further resell digital copies only in those situations that are fully and indisputably comparable to the *Usedsoft* situation, while two (2) Groups report on the contrary. Eight (8) Groups opine that where a licence is granted for a specific number of users, it may not be split up and "sold" separately, while three (3) Groups opine that there could be multi-user-licences in some situations. In connection with exhaustion of copyright, 16 Groups opine that a distinction should not be made for each type of copyright-protected work while nine (9) Groups view that computer programs should be treated differently. Some Groups view this last question from the viewpoint of on-line exhaustion and others view it from a broader prospective.

With regard to exhaustion of copyright-protected works in case of recycling or repair of goods, it seems that many Groups take for granted that a special treatment is not necessary in the case of repair or recycle by the lawful owner of goods as it is generally considered that only the right of distribution is exhausted by the first sale of a copy and thus the infringement of the Three Rights should be decided irrespective of whether the distribution right is exhausted. Three (3) Groups explicitly state this point. In contrast, other three (3) Groups report that an exception should be granted for repair or recycling. Also, some Groups opine or suggest that there should not be infringement of the Three Rights for recycled or repaired goods, if (i) the action is limited to mere maintenance work and/or very minor interventions (1 Group), (ii) repairs are carried out competently and do not affect the individual character of the work (1 Group), (iii) a recycle or repair is technically indispensable (1 Group) or (iv) the recycling or repair of a good does not create a derivative work (1 Group). Some Groups discussed each of the Three Rights individually. Some Groups opine that reproduction rights should not be infringed by a repair or recycle if (i) a new copy is not created (1 Group), (ii) the work is not substantially different (1 Group) or (iii) repairing or recycling does not affect the new demand for the copyrighted work (1 Group). Also, some Groups are of the opinion that there should be no infringement of alteration rights by a repair or recycle if (i) the adapted work represents a new and independent work (1 Group), (ii) the characteristics of the work are not altered (1 Group), or (iii) the act of repairing or recycling does not affect the contents of the work (1 Group).

Some Groups treat moral rights differently from economic rights in connection with recycling or repair of goods. Four (4) Groups point out that consent should be generally necessary when recycling or repair of goods which are copyrightable works. Other four (4) Groups note that goods which are copyright-protected works may be recycled or repaired without infringing the right of integrity to the extent that it is not, to the prejudice of its author’s honour or reputation, distorted, mutilated or otherwise modified.

(iii) Proposals for harmonisation (whether or not harmonisation should be desirable?)

22 Groups opine that the harmonisation of general exhaustion scheme should be desirable while five (5) Groups opine to the contrary.

17 Groups opine that international exhaustion should be harmonised while 13 Groups are against it.

22 Groups view that on-line exhaustion should be harmonised while seven (7) Groups think to the contrary.

14 Groups opine that exhaustion of rights in case of recycling and repair of goods should be harmonised whereas seven (7) Groups think it should not be harmonised.

(iv) Summary

While there is almost a consensus on some basic issues, more specific issues, in particular international exhaustion and on-line exhaustion, are highly controversial. Hot debates can be expected in the Working Committee meeting and the Plenary Session for these issues.