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DIGITAL EXHAUSTION OF THE RIGHT OF DISTRIBUTION IN THE EUROPEAN UNION COPYRIGHT LAW

Justinas Drakšas[1]

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Abstract. In this article, the author presents the conditions for exhaustion of the distribution right and overviews the main sources regulating exhaustion, from which the main problem related to the recognition of digital exhaustion of the distribution right – the separation of the right of communication to the public and the right of distribution – rises. In the view of the author, transmission of works or objects of related rights over computer networks for permanent use by its users is not fully attributable to distribution, due to international and EU provisions restricting the distribution right to material copies only. Therefore, the author considers that intervention of the legislator is necessary in order to implement the rule of digital exhaustion and to make a clear distinction between the rights of distribution and communication to the public. Other risks associated with digital exhaustion of the distribution right, such as the "first copy" problem, and the inefficiency of the technical measures to ensure that works (other objects) transmitted over computer networks are not reproduced without the permission of the rightholder, are also analysed in this work. Notwithstanding the mentioned issues, the author suggests reviewing legal provisions related to digital exhaustion in order to ensure that copyright law better meets actual social relationships and key consumer needs.

INTRODUCTION

While rapid digitisation is allowing more access to copyrighted works and objects covered by copyright related rights on a wide range of electronic devices and computer platforms, it also poses a number of legal challenges that need to be tackled in order to strike a delicate balance between the interests of copyright and related rights holders, and the interests of the users of the said works (related rights objects). Electronic books, music recordings, audiovisual works, illustrations and other content in various digital forms can be shared between rightholders and users of such works (objects), not only by making them publicly available on the Internet (such as by posting these works on content-sharing platforms), but also by allowing users to download them to their devices, making copies of such works, and keeping them for the duration of the desired use. And while the latter method of use of works (or objects of related rights) is almost analogous to the use of tangible

1 PhD student, Vilnius University Faculty of Law. Title of dissertation in progress: "Civil liability and other special remedies applied to Internet intermediaries". E-mail: justinas.draksas@tf.vu.lt.

(physical) copies of the same objects, European Union copyright law has traditionally made a distinction between distributing such works in tangible and digital formats, holding that exhaustion of the distribution right can only apply for tangible objects. Accordingly, users of digital works (objects of related rights), who acquire ownership of these works, are subject to significant constraints in order to ensure an effective exercise of their rights as owners of copyrighted works. This situation raises not only a number of questions concerning the balance between the interests of rightholders and content users, which are important for every consumer, but also allows possible considerations concerning the reasoning of such a legal position, which will be addressed in this paper.

The main purpose of this article is to determine whether there is a need for a reform of EU copyright law in order to establish a distribution right exhaustion rule in the digital environment, as well as to identify the key points of departure on which its proper implementation may depend.

Accordingly, the subject of this paper is the digital exhaustion of the distribution right in EU copyright law, the evolution of its regulation and problems of its application. The author does not analyse in detail the general issues of distribution right or distribution right exhaustion, which do not have any major peculiarities in the context of the digital environment. Nor does the work carry an economic or competitive analysis in assessing the applicability of the distribution right exhaustion rule to the transmission of works (objects of related rights) over computer networks, limiting itself to an analysis of the legal risks involved in establishing such a rule.

The main methods used in the article are: (1) The systematic method, which is used to interpret the provisions governing the distribution right in the context of the overall EU copyright system; (2) The comparative method, which is used to analyse the different positions and arguments presented in the CJEU's case law and to contrast the opinions of scholars on key aspects of digital exhaustion of the distribution right.

1. CONDITIONS OF THE DIGITAL EXHAUSTION OF DISTRIBUTION RIGHT

In order to balance the interests of copyright (and related rights) holders and users of copyrighted works, many copyright law models employ a number of safeguards in favour of the users of works and related rights objects that can limit the ability of rightholders to exercise their rights. Examples of this include copyright term limits, the principle of territoriality of copyright, the *de minimis* rule, as well as various exceptions and limitations to the holders' rights. The latter includes the rule of the distribution right exhaustion, which can generally be described as a limitation of the distribution right, having the rightholders tolerate any distribution - even for economic purposes - of the original or a copy of a work or object of related rights, where such work/object has been made available for the first time on the market with the consent of the rightholder (in other words, by the rightholder herself or a person authorised by the rightholder), by way of a sale or other transfer of ownership of the work/object of related rights (Goldstein *et al*., 2010, p. 305).

The above description of exhaustion is a general one, as exhaustion may be subject to different conditions depending on the jurisdiction that recognises such rule. For example, exhaustion of the

distribution right may apply at a national, regional or even international level, when the rightholder loses the ability to control the chain of distribution of the work or object of neighbouring rights that she has distributed in a particular country, group of countries or anywhere in the world, accordingly[2]. Depending on the nature of the work or object of the related rights, exhaustion of the distribution right in certain cases may also depend on the form of distribution of the work or other object, by transferring such works (other objects) in tangible (fixed) medium or by means of computer networks. In the latter case, the rule of exhaustion would not normally apply to the distribution of a work (other objects), although there are notable exceptions in EU law, as in the case of the distribution of computer programs. Taking into account the internationally established provisions relating to the distribution right, other conditions for the exhaustion of the distribution right remain mostly the same in most copyright systems. These are: *i*.) the sale or other transfer of ownership of copies of the work (the object of related rights) (rather than, for example, a transfer for temporary use, as would be the case with a lease or a loan); and *ii*.) transfer of ownership with the consent of the author (holder of neighbouring rights) or other rightholder (a transfer by lawful means).

The above mentioned conditions for the exhaustion of the distribution right are regulated at international level by Article 6(2) of the 1996 Copyright Treaty of the World Intellectual Property Organisation (WIPO) and by Article 8(2) of the 1996 WIPO Performances and Phonograms Treaty[3]. These provisions are further clarified by the 1996 Agreed Statements of the Parties to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which, *inter alia*, clarify certain terms used in the WIPO Treaties. Among other clarifications, these statements provide that the terms "copies", "original and copies" used in Article 6 of the 1996 WIPO Copyright Treaty and Article 8 of the 1996 WIPO Performances and Phonograms Treaty refer exclusively to fixed (material) copies of works (phonograms) which may be circulated as tangible objects. As discussed in detail below, it is precisely this definition of "copies" and "originals and copies" that constitutes a major obstacle to recognising the exhaustion of the distribution right in the digital environment. And although some authors suggest that the WIPO Agreed Statements only require that there should only be **a possibility** to fix copies or originals of works in a tangible medium and to circulate them as tangible objects, and not for them to be exclusively in a tangible form (Rüffler, 2011, p. 380), this possibility of interpretation has not been taken up by the EU case law.

Apart from a regional character, almost the same type of conditions of distribution right exhaustion as in the case of WIPO agreements can also be found in EU copyright law. For example, Article 4(2) of Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on

2 For example, Swiss case law recognises international exhaustion of the distribution right, which means that the performance of a distribution act in any part of the world can lead to the distribution right being exhausted. The only exception to this rule is audiovisual works, which are subject to the special rules of the Swiss Copyright Act (Mizaras, 2008, p. 417).

3 It should be noted that the Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886 (last supplemented in 1971 and amended in 1979), does not regulate the right of distribution by way of exhaustion. Similarly, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), adopted by the World Trade Organisation (WTO) in 1995, contains only a laconic provision to the effect that it does not lay down the conditions for the application of the exhaustion of the distribution right and the content of the rule (Article 6 of the TRIPS Agreement).

the harmonisation of certain aspects of copyright and related rights in the information society ("the Information Society Directive") provides that the right of distribution of the original or copies of a work shall not be deemed to have been exhausted within the Community, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with her consent [4]. In order to implement the Agreed Statement on the WIPO Copyright Treaty, Article 28 of the recital to the Information Society Directive also provides that the protection of copyright under this Directive shall extend only to the exclusive right to control the distribution of a work fixed in a tangible medium. This provision is complemented by Article 29 of the recital, which states that the issue of exhaustion does not rise in the case of services in general, and online services in particular, since the transmission of works by these services should be subject to the authorisation of the rightholder.

As might be expected, such provisions significantly complicate the broader interpretation of the distribution right exhaustion by completely dissociating digital works from copies of analogous works fixed in tangible media. If the transmission of a digital work was traditionally classified as an online service, the transmission of the work would generally fall outside the scope of the distribution right, but could be classified as an act of communication to the public, as is usual with all online services, in accordance with the above-mentioned provisions of the Information Society Directive. Nevertheless, it may be noted that this is not the only way of qualifying a transmission of a work over computer networks, as, as will be seen below, this interpretation is quite often viewed with reservation by a number of doctrinal authors.

In this context, it should also be noted that similar provisions to those contained in the recital to the Information Society Directive are not, however, contained in Council Directive 92/100/EC of 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version adopted on 12 December 2006 with Directive 2006/115/EC) ("The Related Rights Directive"), which implements the provisions of the above-mentioned WIPO Performances and Phonograms Treaty. However, while at first sight this may give the impression that the scope for distribution right exhaustion is greater in the case of neighbouring rights, a systematic interpretation of the Related Rights Directive in relation to the provisions of the WIPO Performances and Phonograms Treaty of 1996 would certainly lead to the same position on the application of distribution right exhaustion as in the case of the Information Society Directive, thus limiting distribution right exhaustion to distribution of tangible (fixed) object of the related rights.

The before mentioned distinction between the distribution of works (other objects) in tangible and digital formats made by the legislator is probably not accidental. As can be seen from legislation such as the Information Society Directive, the legal logic of this distinction is primarily linked to the

4 It should be noted that the doctrine of exhaustion has been applied through case law even before the adoption of the Information Society Directive. For example, in *Deutsche Grammophon Gesellschaft Gmbh v Metro-SB-Großmärkte GmbH & Co. KG*, C-78/70, the European Court of Justice, in order to safeguard the Community objective of merging national markets into a single market, recognised that the rule of exhaustion of distribution right, which had been used at national level only, could be extended to the regional level of the Community.

concepts of distribution and communication rights and their respective scopes. Namely, with all online services traditionally falling under the public communication domain, it is not surprising that aspects remaining under the distribution right - the transmission of copies of tangible works to users - cannot also be translated into the digital environment, where the public communication right traditionally prevails. And although, as will be seen later, this logic is not fully justified from a functional point of view, the will of the legislator to establish such a distinction on a normative basis obliges to respect it. Accordingly, in order to review the applicability of the right of distribution exhaustion rule in the digital environment, it is necessary to first try to draw clear boundaries (or guidelines) between the rights of distribution and the right of communication to the public, and to examine whether the right of distribution itself can at all be exercised by the transmission of the works (objects of related rights) over computer networks.

2. DISTINCTION BETWEEN DISTRIBUTION AND COMMUNICATION TO THE PUBLIC

Although the rights of distribution and public communication were established at EU level as early as with the 2001 Information Society Directive, the line between them in the digital environment can still be blurry. While explaining the difference between these rights, scholars usually make a distinction between certain characteristics which determine the classification of one or another act in the spheres of public communication or distribution. According to some authors, the distinction between acts of distribution and communication to the public in the context of non-temporary transfers of works or other objects should be drawn by firstly looking at the effect of the transfer of a particular work (other object) to the user, i.e. whether the sharing of a particular work or object of neighbouring rights at the same time transfers the ownership of the object, or whether it is made available for the use of the user at the time of choice, without the retention of the ownership right (Sganga, 2018, p. 15). Other, more conservative interpretations point out that the line between these rights can be drawn according to the nature of the work (other object) itself, or, in other words, whether a particular act transfers tangible or digital copies of the protected object (Linklater, 2014, p. 16).

The evolving case law of the CJEU also brings little clarity to this debate. As early as 3 July 2012, in *UsedSoft GmbH v. Oracle International Corp.*, C 128/11 ("UsedSoft"), CJEU recognised that the exhaustion of the distribution right can be applied in the digital environment (and thus the distribution right can also cover the transmission of works over the Internet), where computer programs are transmitted as works over computer networks. Although this decision led some legal scholars to hope that the digital exhaustion rule could also be applied to other types of works, this view has been refuted by the 19 December 2019 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and others*, C-263/18 ("Tom Kabinet") CJEU decision. The mentioned judgement dealt with the resale of e-books without the authorisation of the rightholder, and stated that downloading works online should be considered as an act of communication to the public rather than an act of distribution, to which the exhaustion rule could potentially apply.

Accordingly, in order to find a starting point in this debate, it is necessary to begin by reviewing the fundamental legal categories relating to the rights of distribution and public communication, on which the qualification of one or other act may depend. This could include, in particular, the distinction between the categories of digital goods and services, the dichotomy between the licensing of the use of a work (as a service) and the sale of a work, and the *lex generalis* nature of the Information Society Directive.

2.1. Relationship between digital goods (sales) and digital services

Acts that may be qualified as services are not covered by the right of distribution. This is constituted by Article 29 of the recital of the Information Society Directive, as well as by other secondary sources of EU law[5] and the case law of the CJEU (Tom Kabinet, par. 51). Nevertheless, a line between what can be considered as a service or a sale of digital content (works or objects of neighbouring rights), when these acts are carried out via computer networks, is not entirely clear.

Although vague, some manifestations of the distinction between them can be found in EU copyright law. As Advocate General Yves Bot points out in his opinion in the UsedSoft case, Article 18[6] of the recital to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("the Electronic Commerce Directive") may suggest that digital sales (online sales) should generally be subsumed under the heading of "digital services", and may not be distinguishable as a separate legal category in the context of copyright law (Advocate General Bot opinion in UsedSoft, par. 76). Nevertheless, the Advocate General also points out that whether certain goods are sold online or in person should logically have no bearing on the qualification of such acts, since they are functionally and practically analogous. For this reason, the Advocate General refers to Article 29 of the recital of the Information Society Directive and Article 18 of the recital of the E-Commerce Directive as "ambiguous". The same view is shared by a large number of legal scholars, who stress that in the context of the exhaustion of the distribution right, it should not matter at all whether the sale of a particular work is made online or physically, as the Information Society Directive itself relates the exhaustion to the tangible or digital nature of a work, and not to the way in which the work is sold (Sganga, 2021, p. 15).

Nor does the UsedSoft judgment itself bring greater clarity, as, although it proposes a unique and highly consumer-friendly position on the sale of digital works (in the case computer programs), it relates it only to the *lex specialis* nature of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("the Computer Programs Directive"), in relation to the Information Society Directive, which, according to the CJEU, in the

5 See, for example, the Green Paper on copyright and related rights in the information society, COM(95) 382 final, p. 45, or the Commission Report on the implementation of the 91/250/EEC Directive, COM(2000) 199 final, p.17.

6 "Information society services cover a wide range of economic activities carried out online, *in particular the sale of goods over the Internet*; <...>" (Article 18).

present context, could be regarded as *lex generalis*. In this case, CJEU held that both the digital sale of computer programs and the provision of computer programs in the form of services (as licences for the use of computer programs) can be considered as sales in the context of copyright law. This is based on the argument that a consumer who downloads a copy of a computer program in question and enters into a licence agreement with the distributor of that copy obtains the right to use the copy indefinitely on payment of an appropriate price. In turn, by providing a copy of the computer program and entering into a licence agreement for its use, the distributor seeks to make that copy available to its customers indefinitely after payment of a price, the purpose of which is to enable the copyright holder to obtain remuneration corresponding to the economic value of the copy of the work which she owns. Taken together, these acts therefore constitute a transfer of ownership of the copy of the computer program in question (UsedSoft, par. 43 - 46). The mere fact that the contract is described as a licence, and not as a sale, does not negate the essential features of that contract, which are much closer to a contract of sale (UsedSoft, par. 49).

And although this position of the CJEU has been criticised, as not all Member States' national law provides for the ownership of intangible assets (Mezei, 2020, p. 7), this interpretation is particularly favourable to striking a balance between the interests of rightholders and those of the users of the works, who would otherwise be prevented from acquiring any ownership rights in the works transferred under contracts disguised as a "licence". In this context, it may also be mentioned that some scholars also suggest that the above-mentioned opposition between the Information Society and Computer Programmes directives, as *lex generalis* and *lex specialis* legislation respectively, is entirely artificial, since the provisions of the Information Society Directive also allow for the application of a similar concept of "sale" to other works. If this position was to be adopted, the ideas presented in the UsedSoft judgment could provide a theoretical starting point for distinguishing between the sale of digital works and the provision of services, and could also in itself contribute to the distinction between the right of communication and the right of distribution in the digital environment.

Another possible route, and one that is sometimes identified in scholarship, would be to look for inspiration not in copyright law, but to other legislation that is related to copyright law but does not directly address the issues it raises. For example, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council ("the Consumer Rights Directive") introduced digital content contracts for the supply of digital content that is not recorded in a physical medium into EU consumer law. According to the directive, digital content is data that is created and made available in digital form, such as computer programs, applications, games, music, video material or text, whether or not it can be accessed by downloading or streaming, physical media or any other means (Article 19 of the recital of the Consumer Rights Directive). This concept is also akin to contracts for the sale (or licensing) of copyrighted works, and for this reason is often identified as a possible intermediate option to address the overlap between service and sales relationships in the digital environment (Ghosh *et al*, 2020, p. 258). Nevertheless,

in the opinion of the author of this paper, such a position should be viewed with some reservation. In order to establish the digital exhaustion of the distribution right in EU copyright law, acts falling within the scope of the distribution right should be qualified as a sale (if the works or other objects are distributed for a remuneration) in any case, as a new type of contract might not entail the transfer the ownership of the digital works or other objects, which is required so that exhaustion would apply. For this reason, the interpretation given by UsedSoft could be considered acceptable and in all cases necessary to justify the application of the exhaustion of distribution right.

In any event, further input in this area would require a very creative interpretation by the courts of the current EU copyright law, or a direct intervention by the legislator, which is likely to be necessary in any case in the light of the position taken by Tom Kabinet on qualifying the acts of transferring works over computer networks as acts of communication to the public.

Of course, at least on a theoretical level, it is possible to continue to question whether Tom Kabinet's decision is justified at all and whether the choice to depart from the interpretative direction developed by UsedSoft was well founded. In this respect, although a possible answer would not lead to a change in the already established practice, it could be a good starting point for a discussion on the introduction of a rule on distribution right exhaustion in the digital environment in the EU, which would also provide some leverage for a hypothetical intervention by the legislator.

2.2. Fragmentation of regulation of computer programs and other types of digital works

The CJEU held in Tom Kabinet that, in view of Article 1(2) of the Information Society Directive, which states that "<...> this Directive does not modify or affect in any way the existing Community provisions on the legal protection of computer programs <...>", the Computer Programs Directive takes precedence in application over the Information Society Directive, which, in contrast to the Computer Programs Directive, makes a distinction between digital and tangible (fixed) copies of works distributed. One of the most striking effects created by this interpretation is the fragmentation of EU copyright law by giving different statuses to computer programs and other types of digital works (Birštonas, 2019). And while the Tom Kabinet decision itself merely followed the line of thought started by UsedSoft on the *lex specialis* nature of the Computer Programs Directive, it also missed an opportunity to provide an independent interpretation, derived solely from the Information Society Directive, which could recognise the rule of exhaustion of distribution right in the digital environment. As Caterina Sganga argues, the text of the Information Society Directive, despite the opinion of CJEU's Tom Kabinet, does not preclude the application of the concept presented by UsedSoft to the interpretation of the Information Society Directive's Article 4, which is devoted to the basic provisions of the distribution right (Sganga, 2021, p. 18). In this respect, it should be noted that, firstly, the Information Society Directive itself attaches great importance to the removal of obstacles to the effective functioning of the internal market, as well as to finding a balance between the interests of copyright holders and those of consumers (Articles 1 - 4 of the recital of the Information Society Directive), which is precisely what the digital exhaustion rule is designed to achieve. Secondly, the

argument that the Computer Programs Directive establishes a different model of distribution right than the Information Society Directive is artificial, since both directives must be interpreted in the context of the WIPO Copyright Treaty that does not make any distinction between computer programs and other works of a digital nature (Rosati, 2015, p. 5). Namely, the WIPO Copyright Treaty provides only a general rule that the distribution right should apply to works in tangible form and does not distinguish between these works according to any other criteria. It is therefore incomprehensible why the CJEU, having chosen in one case to ignore these provisions of the WIPO Copyright Treaty, in another case started to look for arguments why these provisions should prevent the exhaustion of the distribution right, and made a distinction between computer programs and other types of works, even though this distinction is not provided for by the internationally established provisions. Thirdly, Article 20 of the recital to the Information Society Directive provides that "this Directive builds on the principles and rules already laid down in the directives currently in force in this field, in particular Directives 91/250/EEC[7], 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC, and develops and validates those principles and rules in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, save as otherwise provided for in this Directive." It seems that such a provision implies the need to interpret the articles of the Computer Programs Directive also in the context of the model of distribution right created by the Information Society Directive. Although Article 29 of the recital of the Information Society Directive (which contains references to what may constitute an act of distribution) does not take precedence over the provisions of the other Directives, it can be used as a kind of guide for interpreting the provisions of the other Directives which regulate the right of distribution, particularly in view of the fact that, as mentioned above, international law does not distinguish between the subjects regulated by the different Directives.

Based on the above, the distinction between computer programs and other types of digital works in the case law of the CJEU is unjustified. Although the UsedSoft decision has some shortcomings (such as the aforementioned disregard of the provisions of the WIPO Copyright Treaty), in order to avoid fragmentation in EU copyright law, it could have served as a support for further development of case law, by preventing the Court from hiding behind the *lex specialis* argument of the Computer Programs Directive, and by creating a unified model of the exhaustion of the distribution right in EU copyright law, which includes the concept of the "sale" of a digital work as described in section 2.1 of the present work. However, without this step, the need to make a distinction between public communication and distribution rights remains important.

7 14 May 1991 Council Directive 91/250/EEC on the legal protection of computer programs was codified by the adoption of the Computer Programs Directive in 2009.

2.3. The need to redraw the boundaries of distribution and communication to the public rights

One of the main arguments used by the CJEU in the Tom Kabinet judgment to support the position that downloading e-books (or other digital works) via the Internet should qualify as an act of communication to the public was the provision in the WIPO Copyright Treaty's Agreed Statement of the Parties to the WIPO Copyright Treaty, referred to several times in this paper, that the right of distribution should only extend to the acts of transmission of tangible (fixed) copies (Tom Kabinet, par. 40 - 42). Accordingly, the CJEU has stressed that the interpretation of the content of the distribution right must also take into account the fact that it has always been oriented by the legislator to cover only the transmission of copies (originals) of works preserved in tangible media, and not to include the transmission of works of a digital nature. This position is also shared by some scholars, who redraw the boundaries of the distribution and communication to the public rights in the light of the fixed (or non-fixed) nature of the media on which the works may be transferred (Linklater, 2014, p. 16; also Kaiser, 2020, p. 495).

Nevertheless, a different position can be identified, derived from the concept of distribution right presented by UsedSoft. As the CJEU implied in the UsedSoft case, when dealing with non-temporary transfers of works or other objects, the distribution right could be primarily linked to the transfer of ownership of the work and the possibility of making use of the work indefinitely, keeping it at the disposal of the user (UsedSoft judgment, p. 52). In contrast, the act of communication to the public (making available to the public) could in this respect refer to the publication of such a work, where it can be made available to the user at a time and place of her choice, but not retained in the user's possession (by not having the user save a copy of the work on a personal medium). The basis for this position, and its greatest weakness, is the blatant disregard of the norms established in international and EU law concerning the inclusion of only tangible (fixed) copies in regards to distribution. And while one can fully understand the intention behind this position - to improve the position of users in the overall copyright system - simply turning a blind eye to the provisions explicitly enshrined in the legislation does not really strengthen it.

However, if this position is completely rejected, it may give the impression that digital distribution of works (or other objects) in general "falls outside" both distribution and public communication rights and enters a completely undefined territory. This impression is mainly due to the very notion of the right of public communication, which, as mentioned above, has traditionally been associated only with the publication of copyrighted objects, without the users of those objects retaining them in their possession, and not with the possibility of disposing of such objects as their own property and possessing them indefinitely. This could be supported by Article 8 of the WIPO Copyright Treaty, which emphasises the public's ability to access works at the time and place of their choice (without giving any meaning to their use as objects of ownership), as well as by Article 3 of the Information Society Directive and Articles 23 and 24 of its recital. Similarly, while emphasising the possibility for members of the public to access works "without being present at the place from which they are published", they are silent as to the possibility for those members of the public to have these works

at their disposal or to store them on their own media (in the case of digital works). Moreover, it is considered that, according to the CJEU's developed case law on the concept of the right of communication to the public, acts exclusively related to the downloading of works and related rights objects via computer networks to personal media may not fall within the scope of the right of communication to the public at all. For example, the CJEU has stated that, in order to qualify as making a work available to the public, an act must satisfy two cumulative conditions, i.e. the public concerned must be able to access the protected work in question in a place and at a time individually chosen by the public (CJEU judgement of 26 March 2015, *C More Entertainment AB v Linus Sandberg*, C-279/13, par. 24 and 25), and whether the members of that public have made use of that possibility is irrelevant (CJEU judgment of 14 June 2017, *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, C-610/15, par. 31). The Tom Kabinet judgement itself states that "as regards specifically making a protected work or object available to the public in such a way that anyone can access it in a place and at a time of individual choice, <...> the decisive act is the making available to the public of the work, that is to say, the placing of the work on a website which is accessible to the public, which is prior to the actual transmission by means of an on-demand method, and is immaterial to the question of whether the person has actually downloaded it" (Tom Kabinet, par. 64). And although the case law cited above identifies the publication of the work (making it available to the public) as the dominant relationship over the potential obtaining of the work by a download (i.e. making the work available to the public is the qualifying act), the very fact of distinguishing between such acts and considering, which is the dominant act and which is not, indicates that they are separate and non-overlapping acts, of which the obtaining of the work by a download is not close to communication to the public by its very nature. More generally, downloading a work on a personal medium and obtaining it by other on-demand means (e.g. accessing an audiovisual work only on a particular online platform) are different acts which should not be treated in the same way, as they imply a different degree of control over the work that can be exercised by a given user of the work - downloading the work on a personal medium may result in its further transmission (sending) to other destinations, whereas having access to the work only on a specific online platform (although this could also be considered as "obtaining on demand" of the work), the possibilities for its further transmission would be very limited. Such control over the work, which is obtained by owning the work as an object of one's own property, therefore implies the need for a completely different qualification in the context of copyright than that of the right of public communication.

In this context, the author of this paper considers that the transmission of works over computer networks to users, where the users can retain the works in their possession, is closest in essence to distribution, rather than to communication to the public. And while the contrary position presented in the Tom Kabinet judgment may be fully justified by the upholding of international and EU law relating to the category of tangible (fixed) copies, it is clear that some rethinking of the boundaries between distribution and communication to the public is necessary in order to make a clear qualification of transmission of works over computer networks. Since the CJEU has already expressed its position on this issue, it seems that this duty will at some point fall to the legislator.

3. OTHER RISKS OF DIGITAL EXHAUSTION OF THE RIGHT OF DISTRIBUTION

In order to establish a digital distribution right exhaustion rule in EU copyright law, the distinction between distribution and communication to the public rights would not be the only challenge that the legislator might face. Various authors reviewing the regulatory options for this rule have often also highlighted the "first copy" argument, as well as certain risks related to the unauthorised reproduction of works of a digital nature and the unbalanced distribution of the interests of copyright holders and users of works (e.g. see Perzanowski et al, 2011, p. 939; Mezei, 2014, p. 9). However, in the opinion of the author of this paper, the concerns raised should not pose exceptionally high barriers and could be considered unfounded.

The first of the problems identified by scholars relates to the view that the transfer of a work over computer networks from the rightholder's device to the user's medium or device creates an entirely new copy of the work, and that, accordingly, the distribution right cannot apply to this new copy[8]. In other words, the distribution right would not, according to this logic, cover acts which do not transfer works, but only certain information, from which copies of those works can be made (the result is that the rightholder and the user of the works are left with different copies of the works (the original and the copy)). Accordingly, if such a position were to be adopted, the question of exhaustion of the distribution right would not arise at all, since the act of distribution itself, which requires the distributor to transfer and the recipient (the buyer) to acquire the same copy (the original), is considered as have never taken place.

In this respect, it should be noted that, although the above position may be considered justified in a purely theoretical sense, it lacks logical and functional justification. In particular, as Prof. Shubha Ghosh emphasizes, there is no functional difference between the results that can be achieved by a recipient reproducing a copy of a particular work (or other object) on her personal device after it is transmitted over computer networks or after it is transferred by other means that do not require the creation of a new copy of the work or of the object of the neighbouring rights, if the recipient is left with identical copies of such objects in the end (Ghosh et al. 2020, p. 263). Therefore, the fact that the user of a work or other object makes a separate copy presumably does not preclude the argument that the transmission of its first copy (the original) over computer networks may also fall within the scope of the distribution right, since this mode of transmission of copyrighted objects is functionally equivalent to other modes of distribution.

The second of the risks identified by scholars relates to the ineffectiveness of technical measures to ensure that digital works or other objects transmitted/distributed over computer networks are not reproduced more than once. As might be expected, in order for distribution exceptions to operate effectively in the digital environment, and for the interests of rightholders not to be unduly

8 Indirectly, this position can also be found in the case law of the CJEU. For example, in its judgment of 22 January 2015 in *Art & Allposters International BV v Stichting Pictoright*, C-419/13, the CJEU held that the transfer of illustrations onto posters in a new format implies the creation of a new copy, the redistribution of which requires the consent of rightholders.

constrained in this respect, it is essential that users of works and other objects should not be able to make unlimited copies of copyrighted objects transferred to them by rightholders, and to continue to distribute any copies they have reproduced to other users, without there being any practical way of rightholders stopping such unlawful acts of the users[9]. Moreover, in order for the distribution right to be enforceable in the online environment, it is necessary that the users of the works (objects of neighbouring rights) who have sold or otherwise transferred their digital works (objects) do not retain copies of them themselves, thus effectively undermining the rightholders' interest in promoting the sale of works, and that new users of works can reproduce the works (objects of neighbouring rights) only once by transferring them to their personal media (Grigoriadis, 2013, p.205). To this end, forward-and-delete technologies are used in practice to give rightholders digital control over the restriction of reproduction of digital works and related objects. However, it has been observed that there are cases where such technologies are circumvented and copyright objects are reproduced despite technical efforts to limit their copying. This situation suggests to some authors that the situation of rightholders would be particularly worsened by the implementation of the distribution right exhaustion rule, as rightholders would lose the ability to follow the chain of distribution of works and thus indirectly control the reproduction of works (Karapapa, 2014, p. 322).

Notwithstanding the above, it is considered that such a situation should not in itself prevent the implementation of digital exhaustion. The risks associated with the inefficiency of technical means are not unique to the distribution right exhaustion debate and can be found in almost all areas of copyright that involve computer networks. In this respect, it can be agreed with Prof. Péter Mezei that there has never been, and is unlikely ever to be, any technical means that can guarantee the full control over the unauthorised use of works (Mezei, 2020, p. 10). Nevertheless, this has also never stopped the legislator from taking initiatives to regulate the digital space in the context of copyright, nor should the risk of isolated cases in which transmission and erasure technologies are compromised or circumvented be an automatic argument that would suggest that the interests of rightholders would be uniquely affected by the availability of digital exhaustion.

Accordingly, it seems that the introduction of this rule would only align the balance of interests between the physical and digital worlds, with the greatest benefit accruing to consumers, whose interests are often generally overlooked in the debate on the exhaustion of the distribution right. After all, what may have been perfectly adequate for finding a balance of interests decades ago, may not correspond to the social reality and relationships that actually exist today. When the legislator established the model of distribution right exhaustion in the mid-1990s, they could not have been expected that the sale of digital works and related rights objects over computer networks would develop to the level that can be observed today. Moreover, the Internet itself was a relatively new technological tool, which could only be used by a very few users (and certainly not in the ways in which it can be used today). Thus, this violation of the principle of technological neutrality has not only constrained the position of consumers, but has also prevented the development of further

9 In this context, it should be stressed that certain additional reproductions of works or objects of related rights may be considered lawful when they are made on more than one occasion and when they fall under the private-use limitation.

regulation or even case-law, which has at times attempted to find a way, however artificially, to justify the rule of exhaustion of the right of distribution on the Internet. Therefore, at the very least, there is a basis to discuss whether it would be worth for the legislator to revisit this issue and to reconsider whether the interests of consumers are sufficiently important to reverse a legal stance that was adopted, probably, mainly on the basis of inertia.

CONCLUSIONS

1. The act of transmitting digital works over computer networks, where users of these works can download copies onto their personal storage media for a fee, currently falls into a kind of "grey area", where the distinction between the right of public communication and the right of distribution is not fully clear. However, a systematic reading of the sources covering the rights of communication and distribution would suggest that above-mentioned acts are, by their nature, closer to the field of distribution right.

2. The use of exhaustion in the digital environment would help to balance the interests of rightholders and users of works (related rights objects) in the physical and digital environment, and at the same time could better safeguard the rights of users in the context of the accelerating digitisation of the content they use. In the view of the author, a supposed lack of technological means for preventing further copies of downloaded digital works or the technical nature of copying certain works does not prevent the implementation of exhaustion rule from a functional point of view.

3. The provisions of the 1996 WIPO Copyright Treaty and the 1996 WIPO Performances and Phonograms Treaty, which make a distinction between tangible (fixed) and digital copies of copyright-protected works, as well as all relevant provisions of the EU Directives implementing these WIPO treaties, are no longer in line with actual social relations and could be reconsidered by the legislator. To this end, a clearer distinction should be drawn between the right of communication to the public and the right of distribution, which would require an intervention by the legislator.

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