

Submission to ATRIP 2018

**The Fairness of Digital Second-Hand Marketplaces and the Future of the Doctrine of Exhaustion**

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The exhaustion of the right of distribution is a century old doctrine of copyright law (known as first sale doctrine in the United States). It has developed gradually to cover the resale of lawfully sold copies of works and other subject matter, and to exclude service type dissemination of those contents. As such, its ultimate purpose was to provide for a fair balance of the interests of property and copyright owners. The emergence and rapid spread of digital technologies, especially the internet, hasn't left untouched this area. It was only a question of time when courts needed to decide on the transferability of copies sold originally in digital format. Court decisions/pending proceedings in *UsedSoft*, *ReDigi*, *Tom Kabinet*, *Green-IT*, *Ranks & Vasilevičs*, *VidAngel* cases are the most important ones related to "digital exhaustion".

In fact, two main approaches collide when discussing digital exhaustion. The traditional positivist approach sticks to the status quo envisaged by the international and the European copyright norms. Followers of this approach rely heavily on dogmatic arguments (especially based on WCT's Agreed Statement to Article 6) and on economic reasons (especially those related to the negative effects of digital copies on the market of the original rightholders). The constructive realist approach stresses that copyright law and property law in general must develop in light of the social and economic changes. This approach notes that both copyright and property law can and should adapt to social realities and they should apply to digital copies, too. The presentation introduces what legal, economic and social arguments support the introduction of a fair and reasonable digital exhaustion doctrine.

The presentation is based on the author's forthcoming book on Copyright Exhaustion published by Cambridge University Press ([www.cambridge.org/9781107193680](http://www.cambridge.org/9781107193680)).