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TOM KABINET:

The Case of Digital Exhaustion

KEYWORDS:

DIGITAL; EXHAUSTION; COPYRIGHT; EBOOK; SECOND-HAND

ABSTRACT

The purpose of this paper is to question whether resistance towards a second-hand market for eBooks is misled; whether downstream control is necessary to preserve copyright incentives in a digital market; and whether technological developments could mitigate the risks associated with digital exhaustion. The case of Tom Kabinet has been chosen as the subject of this research as it embodies the debates affecting digital exhaustion and eBooks. This inquiry utilises a doctrinal legal analysis to explore the *Kabinet* ruling as well as a scoping investigation of the arguments surrounding digital exhaustion and its relationship to the publishing industry. The findings of this study indicate that stakeholders in publishing remain cautious of digital exhaustion. However, the emergence of forward-and-delete technology suggests that a second-hand market for eBooks is not beyond the realm of possibility in the future.

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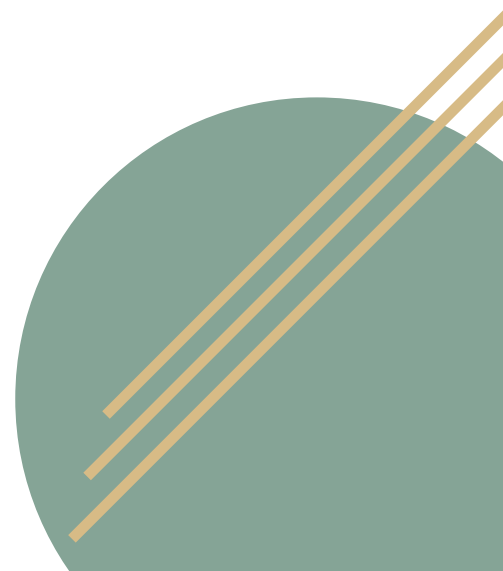
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FULL ARTICLE

1 INTRODUCTION

In 2018, a copyright lawsuit was brought against Tom Kabinet — a Dutch company that sold second-hand eBooks through an online platform. The Court of Justice of the European Union (CJEU) had to decide whether the doctrine of exhaustion of intellectual property rights, traditionally applied to physical copies, could be transposed to the virtual world of digital copies.¹ In essence, exhaustion is the legal principle that allows second-hand markets to operate by balancing the intellectual property rights of copyright holders with the personal property rights of the copy holder. Following the legitimate distribution of a copy, the rightsholder's interests are held to be 'exhausted'. This allows the copy holder to freely transfer and otherwise use their property without the rightsholder objecting to or restricting its use.

In *Kabinet*² it was reasoned that, unlike physical books, eBooks do not deteriorate with use and exchanging such copies requires neither additional effort nor cost.³ Therefore, a parallel second-hand market for digital copies would likely threaten the interests of copyright holders in obtaining appropriate remuneration for their works damaging copyright incentives.⁴ Consequently, the Court held that there was no exhaustion and that Tom Kabinet's platform infringed copyright holders' interests. Therefore, as the rightsholder's interest in the work did not exhaust following communication, the copy holders were not free to transfer their digital purchases but must instead operate within the purpose/period defined by the copyright holder.

However, it has been argued that the decision in *Kabinet* did not conclusively settle nor eliminate the possibility of digital exhaustion in the future.⁵ Furthermore, in an increasingly ambiguous area of the eBook market, the transactional clarity that the exhaustion doctrine represents could be key to resolving uncertainties concerning digital purchases.

1 Ansgar Kaiser, 'Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C - 263/18 – Tom Kabinet on E-Books and Beyond' *GRUR International*, 69.5 (2020), 489-95 <<https://doi.org/10.1093/grurint/ikaa043>> (p.489).

2 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV*. No. C-263/18, ECLI:EU:C:2019:1111. Judgment of the Court of Justice. 2019

3 Franco Rizzuto, 'The European Court of Justice rules in Tom Kabinet that the exhaustion of rights in copyright has little place in the age of online digital formats' *Computer and Telecommunications Law Review*, 26.4 (2020), 108-15 (p.111);

Alexandra Morgan, Paul Abbott, and Dr. Christopher Stothers, 'ECJ rules that the sale of second-hand e-books infringes copyright' *Journal of Intellectual Property Law & Practice*, 15.4 (2020), 236-38 <<https://0-doi-org.wam.city.ac.uk/10.1093/jiplp/jpaa025>> (p.236-37).

4 Joseph P. Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership' *William & Mary Law Review*, 42.4 (2001) 1245-366 <<https://scholarship.law.wm.edu/wmlr/vol42/iss4/5>> [Accessed 02 Aug. 2020] (p.1351-55).

5 Péter Mezei, 'The Doctrine of Exhaustion in Limbo - Critical Remarks on the CJEU's Tom Kabinet Ruling' *Jagiellonian University Intellectual Property Law Review*, 2 (2020), 130-53 <<https://dx.doi.org/10.2139/ssrn.3560138>> (p.130, 153); Vilhelm Schröder, 'The rise and (partial) fall of digital exhaustion as the CJEU hits the brakes in Tom Kabinet' *IPRInfo*, 21 Jan 2020 <<https://iprinfo.fi/artikkeli/the-rise-and-partial-fall-of-digital-exhaustion-as-the-cjeu-hits-the-brakes-in-tom-kabinet/>> [Accessed 14 Aug. 2020].

By analysing the CJEU's reasoning in *Kabinet* and investigating the remaining questions concerning digital exhaustion, this study provides a deeper understanding of the risks and opportunities a second-hand market for eBooks presents to contemporary publishing whilst exploring the technological developments that may redefine the eBook market.

2. METHODOLOGY

Underpinned by a constructivist worldview, this research employed a qualitative case study approach in order to facilitate a discussion of the meanings that stakeholders in the publishing industry assign to digital exhaustion.⁶ The case of *Tom Kabinet* has been chosen as the subject of this research as it embodies the debates affecting digital exhaustion and eBooks.⁷ The purpose of this research is twofold. Firstly, it is instrumental as the case plays a 'supportive role' in facilitating a deeper understanding of the different perspectives on a second-hand market for eBooks.⁸ Secondly, it is explanatory as it "[unravels] the connections between different parts of the issue" and offers explanations based on their interrelationships.⁹

This research has drawn inspiration from case study design in adherence to a holistic method of studying phenomena.¹⁰ Following Simons' definition, the 'case study' is an "in-depth exploration from multiple perspectives of the complexity and uniqueness of a particular project, policy [...] or system in a 'real life' context".¹¹ This definition has been used to inform the current case study in order to create a holistic and richer image of a complex reality, and therefore, contributing a deeper analytical understanding of the subject despite limited generalisability.¹²

Considering the legal nature of the study, a rich resource of retrospective data exists which were utilised to ensure the objectivity of the case history. Therefore, the inquiry applied a doctrinal legal analysis in order to first locate and then analyse the sources of

6 E.G. Guba and Y.S. Lincoln, 'Competing paradigms in qualitative research.' in *Handbook of qualitative research* by N.K. Denzin and Y.S. Lincoln (Thousand Oaks, CA: SAGE Publications, Inc., 1994), 105-17 (p.105); Gary Thomas, *How to do your Case Study*, 2nd edn, (Thousand Oaks, CA: SAGE Publications, Inc., 2016), p.4; Graham Hitchcock and David Hughes, *Research and the Teacher: A Qualitative Introduction to School-based Research*, (London: Taylor & Francis Group, 1995), p.322.

7 Gary Thomas and Kevin Myers, *The Anatomy of the Case Study*, (London: SAGE Publications, Ltd., 2015), p.122; Michel Wieviorka, 'Case studies: history or sociology.' in *What is a Case? Exploring the Foundations of Social Inquiry* by Howard S. Becker and Charles C. Ragin (Cambridge: Cambridge University Press, 1992), p.60; G. Thomas, p.18, 111.

8 Robert E. Stake, 'Qualitative Case Studies.' in *The Sage Handbook of Qualitative Research*, 3rd edn, by N.K. Denzin and Y.S. Lincoln (Thousand Oaks, CA: SAGE Publications, Inc., 2005), p.445.

9 G. Thomas, p.132, 123.

10 Martyn Denscombe, *The Good Research Guide*, 5th edn, (Buckingham: Open University Press., 2014), p.63; Wieviorka, p.160.

11 Helen Simons, *Case Study Research in Practice* (London: SAGE Publications, Ltd., 2012), p.21.

12 Howard Becker, *Tricks of the Trade* (Chicago: University of Chicago Press, 1998), p.12; Michel Foucault, 'Questions of Method: An Interview with Michel Foucault', *Ideology and Consciousness*, 8 (1981), 3-14 (p.6); C. M. Campbell, 'Legal Thought and Juristic Values' *British Journal of Law and Society*, 1.1 (1974), 13-30 (p.20)

the law establishing the context of the subject.¹³ In order to effectively analyse the data gathered, this study utilised the constant comparative method to clearly develop the architecture of the debate whilst eliciting core themes. As Taylor and Bogdan explain:

[I]n the constant comparative method the researcher simultaneously codes and analyses data in order to develop concepts; by continually comparing specific incidents in the data, the researcher refines these concepts, identifies their properties, explores their relationships to one another, and integrates them into a coherent explanatory model.¹⁴

The legal analysis is supplemented by a scoping study of the remaining questions concerning digital exhaustion and its relationship to the publishing industry. The strength of a scoping study lies in its ability to illustrate and contextualise the nature of primary research whilst identifying areas where additional data needs to be collected.¹⁵ The themes elicited from the scoping study were then compared against the provisional interpretations outlined in the legal analysis, and meanings were then corroborated or refuted.¹⁶

3. TOM KABINET

Throughout the growth of the digital economy, the scope of exhaustion has been widely debated. One of the main disputes is whether licensed electronic copies of works can be considered as a sale. This differentiation is crucial as sales create personal property entitlements for the purchaser, whilst licences merely result in a right to use that content for a defined purpose and period, preventing users from having property claims on the content they purchase.¹⁷

The cause of this uncertainty is arguably *UsedSoft* — a platform that resold used software licences.¹⁸ In 2012, the Court concluded that the “exhaustion of the right of distribution of copies of computer programs”, under Article 4(2) of the Computer Programs Directive, concerns both tangible and intangible copies of a computer

13 Terry Hutchinson and Nigel James Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ *Deakin Law Review*, 17.1 (2012), 83-119 (p.110, 113, 116-118); Rosalind Hurworth, ‘Document Analysis’ in *Encyclopaedia of Evaluation* by Sandra Mathison, (Thousand Oaks, CA: SAGE Publications, Inc., 2011), 119-20 (p.119).

14 Steven J. Taylor and Robert Bogdan, *Introduction to Qualitative Research Methods: The Search for Meanings* (New York: Wiley, 1984), p.126.

15 Hilary Arksey and Lisa O’Malley, ‘Scoping studies: towards a methodological framework’ *International Journal of Social Research Methodology*, 8.1 (2005), 19-32 (p.30); Stuart Anderson and others, ‘Asking the right questions: Scoping studies in the commissioning of research on the organisation and delivery of health services’ *Health Research Policy and Systems*, 6.7 (2008) <<https://doi.org/10.1186/1478-4505-6-7>> (p.10)

16 Dvora Yanow, *Conducting Interpretive Policy Analysis* (Thousand Oaks, CA: SAGE Publications, Inc., 2011), p.9, 14, 30.

17 Stavroula Karapapa, ‘Exhaustion of rights on digital content under EU copyright: positive and normative perspectives’ in *Research Handbook on Intellectual Property and Digital Technologies* ed. by Tanya Aplin (Cheltenham: Edward Elgar, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3278149> [Accessed 30 Jul. 2020], p.22, 14.

18 *UsedSoft GmbH v Oracle International Corp.* No. C-128/11, ECLI:EU:C:2012:407. Judgment of the Court (Grand Chamber). 2012; Kaiser, p.491; Karapapa, p.1; Lionel Bently and others, *Intellectual Property Law* (Oxford: Oxford University Press, 2018), p.152.

program.¹⁹ Therefore, the right of distribution exhausted following the first sale of the computer program.²⁰ Following this judgment, the question arose as to whether the same conclusion could be extended to other copyright-protected digital formats, such as eBooks. The implications are significant because the applicability of exhaustion to copyrighted digital media in this way would facilitate the “establishment and operation of second-hand markets for copyright-protected works [...] in digital format”.²¹ This judgment led Tom Kabinet to assume that once legally purchased, the eBook may be “resold or donated, without permission of the owner of the eBook”.²² Consequently, the case of *Tom Kabinet* attracted much attention as it represented an opportunity for increased clarity in an otherwise uncertain field.

Importantly, in *UsedSoft*, the Court held that it is the nature of the transaction that matters; the act of “[m]erely calling a contract a licence” is not enough to circumvent the exhaustion doctrine.²³ The Court explained that “a contract that allows for a possession/use of the work for an indefinite period, in exchange for a single, upfront payment results in a sale”²⁴ — even when there has been no transfer of ownership.²⁵

THE CASE

Tom Kabinet's business model consisted of buying and reselling eBooks to individuals registered on its platform through ‘Tom's Leesclub’ (reading club).²⁶ The website included measures to prevent the illegal circulation of eBooks, such as a unique watermark embedded in the eBooks that prevented duplicate copies from being uploaded.²⁷ Furthermore, Tom Kabinet required members to declare that they had erased any copies of the eBook following resale or donation.²⁸ For each traded book, Tom Kabinet kept 50 cents to forward to the authors and the publishers.²⁹

19 ‘Council Directive 2009/24/EC On the Legal Protection of Computer Programs.’ *Official Journal* (L 122, 2009); Morgan, Abbot and Stothers, p.237.

20 Rizzuto, p.108.

21 Ibid.

22 Bernd Fiten and Geert Somers, ‘You can’t just resell an e-book’ Timelex, 17 Feb 2020, <<https://www.timelex.eu/en/blog/you-cant-just-resell-e-book>> [Accessed 28 Jul. 2020].

23 Mezei, *The Doctrine of Exhaustion in Limbo*, p.136; Karapapa, p.24.

24 Provided the payment is held to be sufficient consideration “to enable the copyright holder to obtain [reasonable] remuneration”, *UsedSoft GmbH v Oracle International Corp.* para. 49.

25 Péter Mezei, ‘Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment’ *JIPITEC*, 26 (2015) 23-71, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615552> [Accessed 20 Jun. 2020] (p.42).

26 Morgan, Abbot and Stothers, p.236.

27 Kaiser, p.491; Karapapa, p.26.

28 Terms and Conditions: “Tom Kabinet expressly assumes that a Member who offers, donates, or sells an eBook through this Website does not withhold a copy of it. The Member declares and guarantees that the eBook will be erased [...] and that [it] is therefore no longer [in his/her possession]” (Fiten and Somers); Mezei, *The Doctrine of Exhaustion in Limbo*, p.132.

29 Kaiser, p.491.

Proceedings were brought against the platform by two associations representing the interests of Dutch publishers seeking an injunction to stop Tom Kabinet.³⁰ *Nederlands Uitgeversverbond* (NUV) and *Groep Algemene Uitgevers* (GAU) claimed that Tom Kabinet's activities "infringe their affiliates' copyright", and submitted that by selling second-hand eBooks, Tom Kabinet was making an unauthorised communication to the public.³¹ However, Tom Kabinet argued that "such activities are covered by the distribution right which [...] is subject to a rule of exhaustion".³² If copyright holders' interest in the eBooks was held to be exhausted, NUV and GAU would no longer have the exclusive right to prohibit the distribution of those eBooks to the public.

Four questions were referred to the CJEU by the District Court of The Hague. The first two concerned whether "the offer for the sale of eBooks qualifies as a sale, instead of a licence, and depending on its legal classification, whether the exhaustion rule can apply".³³ The last two questions focused on the reproduction that takes place during online transfers. Karapapa interprets the latter two questions as the referring court seeking guidance on the legitimacy of forward-and-delete mechanisms.³⁴

The central question faced in *Tom Kabinet* was whether the supply to the public by downloading, for permanent use, of an eBook is an act of distribution to the public or a communication to the public.³⁵ This differentiation is important as under Article 4(2) of the InfoSoc Directive authors have the exclusive right to authorise/prohibit any form of distribution to the public, but that right is held to be exhausted upon the first authorised sale of the work.³⁶ Alternatively, Article 3(1) of the Directive provides authors with the exclusive right to authorise/prohibit any communication to the public of their works, but unlike the distribution right, the communication right does not exhaust.³⁷

In consideration of this difference, the CJEU referenced related legislation to contextualise the wording of Articles 3(1) and 4(2). The Court argued that Directive 2001/29 serves to implement the EU's obligations under the World Copyright Treaty (WCT).³⁸ When analysed through this wider lens, the expression of "original and copies" in the WCT refers exclusively to "fixed copies that can be put into circulation as tangible objects"³⁹ — and therefore, cannot cover the distribution of intangible works such as eBooks.⁴⁰ Consequently, the "supply to the public by downloading, for permanent use, of an eBook is covered by the concept of 'communication to the public'".⁴¹

30 Morgan, Abbot and Stothers, p.236.

31 Rizzuto, p.109.

32 Ibid.

33 Karapapa, p.27.

34 Ibid., p.27-28.

35 Morgan, Abbot and Stothers, p.236; Rizzuto, p.109.

36 'Council Directive 2001/29/EC On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', *Official Journal* (L 167, 2001); Morgan, Abbot and Stothers, p.236; Rizzuto, p.109.

37 Ibid.; Schröder.

38 'World Intellectual Property Organisation Copyright Treaty.' *Official Journal* (L 089, 1996), 8-14.

39 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV.*, para. 40.

40 Morgan, Abbot and Stothers, p.237; Rizzuto, p.109; Kaiser, p.492.

41 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV.*, para. 74.

RULING

PROTECT AUTHORS

The Court held that the principal objective of Directive 2001/29 is to “establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works”.⁴² In light of this understanding, the “development of a second-hand market for eBooks without the appropriate [authorisation/remuneration] of the author on each occasion the work was accessed following each resale” would risk damaging the protection afforded to rightsholders.⁴³

ECONOMIC AND FUNCTIONAL EQUIVALENCE

The Court held that electronic and tangible dissemination should be treated differently, explaining that “supply of a [physical book] and the supply of an eBook cannot [be] considered equivalent from an economic and functional point of view”.⁴⁴ This distinguished *Kabinet* from *UsedSoft* as the latter held that exhaustion can be applied to situations where a digital transfer is considered functionally equivalent to a physical transfer.⁴⁵ In *Kabinet*, the Court maintained that “a parallel second-hand market would be likely to affect [copyright holders’ economic interests] much more than the market for second-hand tangible objects”⁴⁶ — as they do not deteriorate and digital transfer does not require additional effort/cost by the transferor. As Kaiser explains, “the relative ease of digital transfers threatens the integrity of the market as “[physical] copies are economically characterised by scarcity – digital copies are not”.⁴⁷

COMMUNICATION TO THE PUBLIC

In order to establish ‘communication to the public’, the Court cited the ruling in *Stichting Brein* which outlines two cumulative criteria: a communication of the work; and a communication of that work to the public.⁴⁸ In *Kabinet*, the Court held that there was a communication of the work as copies were available to anyone registered with the reading club.⁴⁹ In order to constitute a communication to the public, a *de minimis* threshold has to be met considering both “simultaneous and

42 Ibid., para. 48.

43 Rizzuto, p.113.

44 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV.*, para. 58.

45 Kaiser, p.490.

46 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV.*, para. 58; Rizzuto, p.111-13; Morgan, Abbot and Stothers, p.237.

47 Giles Clark and Angus Phillips, *Inside Book Publishing*, 6th edn, (London: Taylor & Francis Group, 2020), p.20; Kaiser, p.492.

48 *Stichting Brein v Ziggo BV and XS4All Internet BV.* No. C-610/15, ECLI:EU:C:2017:456. Judgment of the Court (Second Chamber), 2017; Rizzuto, p.111.

49 Morgan, Abbot and Stothers, p.237.

sequential users".⁵⁰ The Court found that there was no technical measure on the platform which ensured that "only one copy of a work may be downloaded"⁵¹ — and secondly, that "after that [access] period has expired, the downloaded copy can no longer be used by that user".⁵² Consequently, the CJEU maintained that the number of persons who may have access to the work via the platform was substantial, and therefore, "must be regarded as being communicated to the public".⁵³ Consequently, the Court held that Tom Kabinet's platform infringed copyright holders' interests.

4. THE DOCTRINE OF EXHAUSTION

COPYRIGHT AND PUBLISHING

Publishing cannot exist without copyright: "[it] is the foundation upon which the entire edifice of modern publishing has been built".⁵⁴ Copyright exists to protect the rights of authors by bestowing an exclusive right to sell or licence a work to others.⁵⁵ It establishes a right in intellectual creation, defines the relationship between creator and distributor (i.e., author and publisher) and establishes the balance between the interests of rightsholders and the public.⁵⁶ Two of the main arguments that justify the existence of copyright are *reward theory* and *incentive theory*.⁵⁷ Reward theory purports that protection is afforded to authors because "it is fair to reward an author for the effort expended in creating a work and making it available to the public".⁵⁸ Whilst incentive theory maintains that the dissemination of cultural objects is a valuable activity, and subsequently copyright exists to encourage the production of works by protecting them against market failure.⁵⁹

Importantly, these justifications only grant the level of protection required to induce the right holder to create and release the work: they are not designed to provide perpetual, unqualified protection. Historically, the exhaustion doctrine has existed as a balancing mechanism within copyright law to create an explicit line between the rights of the creator and the consumer.⁶⁰ This dividing line is achieved through the natural result of two overlapping forms of property that can subsist simultaneously on a copyright-protected work: the intellectual property rights of

50 Ibid.

51 Rizzuto, p.112.

52 Ibid.

53 Ibid.

54 Mira T. Sundara Rajan, 'Copyright and Publishing' in *The Oxford Handbook of Publishing*, ed by Michael Bhaskar and Angus Phillips (Oxford: Oxford University Press, 2019) 71-83 (p.71).

55 Ibid., p.72; Clark and Phillips, p.130.

56 Sundara Rajan, p.72-3.

57 Bently and others, p.39.

58 Ibid.

59 Ibid., p.42.

60 Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (The Information Society Series), (London: The MIT Press, 2016), p.26.

the creator, and the personal property rights of the owner.⁶¹ These coexisting forms of ownership mean that once a copy of a work protected by copyright has been lawfully placed in circulation by the author, copy holders can “sell, give away, lend or rent their copies even when the copyright holder objects”.⁶² This is because the property rights of the owner now take precedence over the author’s intellectual property interests as the author is deemed to have obtained the remuneration due for that particular copy, limiting the level of copyright protection afforded to them.⁶³

With this understanding, Karapapa attributes the essential qualities of tangibility and its impact on dissemination to be the central hypothesis underlying exhaustion.⁶⁴ Consequently, the nature of physical transfers justify exhaustion as a “concession to the practical difficulty [of] controlling subsequent acts of distribution of a tangible object”.⁶⁵ However, the proliferation of the digital economy has brought into question whether the balance that the physical justification of exhaustion achieved in the past is adaptable to the modern world.⁶⁶ As Sundara Rajan posits, it is the balance between the interests of rightsholders and the public in regard to what constitutes a reasonable level of protection that has become a source of extraordinary conflict in the digital age.⁶⁷ Given the closeness of the relationship between intellectual property and publishing, the transformation of copyright law in the digital landscape will undoubtedly affect the future of the industry.⁶⁸

THE DIGITAL AGE

RISE OF DIGITAL BUSINESS MODELS

The emergence of the Internet has caused rapid and significant changes to the market for — and distribution of — media goods.⁶⁹ In 2019, digital formats accounted for 19 per cent of the total invoiced UK sales of books.⁷⁰ However,

61 Karapapa, p.7.

62 Perzanowski and Schultz, *The End of Ownership*, p.25.

63 U.S. Copyright Office. DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act. (Washington, D.C: United States Copyright Office, 2001), p.88; Rizzuto, p.108.

64 Karapapa, p.7.

65 Ibid.

66 Perzanowski and Schultz, *The End of Ownership*, p.33.

67 Sundara Rajan, p.72.

68 Michael Bhaskar and Angus Phillips, 'Introduction' in *The Oxford Handbook of Publishing* by Michael Bhaskar and Angus Phillips (Oxford: Oxford University Press, 2019), 1-18 (p.11); Sundara Rajan, p.71.

69 Aaron Perzanowski and Chris .J. Hoofnagle. 'What we buy when we buy now' *University of Pennsylvania Law Review*, 165 (2017), 315-78 <https://scholarship.law.upenn.edu/penn_law_review/vol165/iss2/2/> [Accessed 19 Jul. 2020] (p.323); Rüdiger Wischenbart and Michaela A. Fleischhacker. 'the digital consumer barometer' (2020), <<https://www.wischenbart.com/upload/2020-digital-consumer-book-barometer-Final-8Jun2020.pdf>> [Accessed 28 Jan. 2021], p.6.

70 Clark and Phillips, p.15, 48; The Publishers Association, *Publishing Yearbook 2018*. (London: The Publishers Association, 2019), p.15.

between 2014 and 2018, eBook sales fell by a fifth, whilst revenue from subscription platforms rose by 15 per cent.⁷¹

The growth of the digital access economy risks blurring the line between copyright holders' interests and the rights of the consumer as it creates the belief that "the content is the commodity and what consumers buy is access".⁷² This development is responsible for the increased ambiguity surrounding the nature of digital transactions as consumers incorrectly believe that they are entitled to lend, resell, and otherwise transfer their purchases when in reality they cannot.⁷³ Yet this uncertainty is not easily remedied in a marketplace where "what can and cannot be done with copyright content is determined by unilaterally imposed [licensing contracts]" which complicate notions of ownership.⁷⁴ Horan terms the emergence of "ultra-restrictive and non-transferable licences" in place of sales as "Digital Feudalism".⁷⁵ As Perzanowski and Schultz explain, this means that the balance achieved by copyright is no longer defined by policy but instead by what private owners choose.⁷⁶ As Horan firmly states, "[whilst contract] may have once been used to balance the scale for copyright owners, that scale has now been grossly tipped in their favour".⁷⁷ Expanding further, the extended scope of exploitation via contract has the potential to injure consumer welfare and threatens to undermine personal property rights in the digital market completely.⁷⁸

In response to this, it has been argued that the inclusion of a contemporary exhaustion doctrine could help recalibrate coexisting forms of ownership interests in the digital market.⁷⁹ The strength of exhaustion lies in its capacity to create a clearly identifiable set of personal property rights that in turn underpin transactional clarity.⁸⁰ Certainty is crucial for the success of any market as it encourages innovation and protects the autonomy of the consumer.⁸¹ Thompson corroborates this stance in his discussion of the digital market, suggesting that eBook sales will grow once technical, legal, and financial uncertainties have been resolved.⁸²

71 Publishers Association, p.14.

72 Frania Hall, *The Business of Digital Publishing*, (Oxon: Routledge, 2013), p.170; John Thompson, *Merchants of Culture*, 2nd edn, (Polity Press: Cambridge, 2012), p.376.

73 Xiaohua Zhu and Cho Moonhee. 'The End of Ownership?: An Investigation of Users' Preferences and Perceptions of Ownership Configurations' *81st Annual Meeting of the Association for Information Science & Technology*, (2018), 618-27 (p.618); Perzanowski and Hoofnagle, p.353, 323.

74 Karapapa, p.5, 2.

75 Elizabeth Horan, 'Die Hard (and Pass on Your Digital Media): How the Pieces Have Come Together to Revolutionize Copyright Law for the Digital Era' *Case Western Reserve Law Review*, 64.4 (2014), 1829-1865 <https://pdfs.semanticscholar.org/3cf4/3f51c159094c1d1d8c886ad0e0aa313435bd.pdf?_ga=2.261632205.1936746995.1598810597-1908137176.1593516200> [Accessed 12 Jun. 2020] (p.1832-33).

76 Perzanowski and Schultz, *The End of Ownership*, p.33, 187.

77 Horan, p.1860.

78 *Ibid*, p.1849; Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin Books: London, 2005), p.147, 199.

79 Karapapa, p.11.

80 Liu, p.1337.

81 Karapapa, p.5, 11.

82 John Thompson, *Books in the Digital Age* (Cambridge: Polity Press, 2005), p.317.

DIGITAL EXHAUSTION

Two competing approaches to contemporary exhaustion exist: firstly, the “traditional, positivist (pro-copyright) vision” — which calls for the exclusion of the exhaustion principle from the digital environment; and secondly, the “constructive realistic” approach that urges the adoption of a flexible and limited form of the doctrine for the “sake of users’ rights and the development of online economies”.⁸³

Rizzuto posits that the digitisation of copyrightable content has upset the balance between the interests of copyright holders and consumers in two directions: firstly, it has become possible to inexpensively transfer copies of digital files without additional effort or cost; and secondly, technology enables copyright holders to exercise excessive control over downstream uses of their works, permitting the development of “commercial models [which] transform the full enjoyment of the copy of a work into a mere limited and conditional right to use it”.⁸⁴ This dichotomy is the foundation of the debate surrounding digital exhaustion.

When it fulfils its potential, exhaustion can enhance the objectives of copyright law and promote access to cultural works through the accommodation of second-hand markets.⁸⁵ Furthermore, exhaustion can be seen to strengthen competition and encourage innovation by mitigating lock-in effects as it allows consumers to resell goods and offset the costs they encounter when switching platforms.⁸⁶ However, if not effectively adapted to the digital copyright economy, exhaustion presents a substantial threat.⁸⁷ Crucially, digital copies do not deteriorate, therefore — from an economic perspective — second-hand copies of digital goods are identical to original copies.⁸⁸ For this reason, publishers oppose digital exhaustion on the grounds that “a second-hand market would be indistinguishable from the first-hand market”.⁸⁹ This indistinguishability challenges the sustainability of the sector and in particular the remuneration of authors.

Furthermore, the multiplication of works might risk competition cannibalising the primary market. As Vanschoonbeek, president of the Federation of European Publishers, explains: “a second-hand digital market would seriously endanger the whole book economy since digital copies can be numerous and potentially be sold to an indefinite number of users”.⁹⁰ Ultimately, stakeholders in the publishing industry have argued that any other judgment in *Kabinet* would have been “disastrous for authors and publishers”.⁹¹

83 Mezei, *Digital First Sale Doctrine Ante Portas*, p.25.

84 Rizzuto, p.108.

85 Karapapa, p.5-9; Mezei, *Digital First Sale Doctrine Ante Portas*, p.55.

86 Horan, p.1864; Karapapa, p.10; Aaron Perzanowski and Jason Schultz, ‘Digital Exhaustion.’ *UCLA Law Review* 58 (2010), 889-946 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669562> [Accessed 18 Jun. 2020] (p.899).

87 Mezei, *The Doctrine of Exhaustion in Limbo*, p.134.

88 Bently and others, p.151.

89 FEP. ‘PRESS RELEASE - FEP welcomes the judgment of the CJEU in the case C-263/18 (Tom Kabinet).’ *Federation of European Publishers*, 2019 <<https://fep-fee.eu/PRESS-RELEASE-FEP-welcomes-the-1086>> [Accessed 28 Jul. 2020].

90 *Ibid.*

91 Katie Mansfield, ‘PA welcomes EU court ruling on e-book exhaustion rights.’ *The Bookseller*,

5. THE FUTURE OF DIGITAL EXHAUSTION

The *Kabinet* ruling evidence the claim that digital exhaustion presents too large a risk to become a reality in the current online market.⁹² However, by dismissing the three remaining questions posed by the referring court, Mezei argues that the CJEU failed to resolve the ambiguity of this area of law.⁹³ Furthermore, the judgment does not go so far as to rule out the development of second-hand markets for digital products in the future.⁹⁴ Consequently, the repercussions of *Kabinet* and its effect on digital exhaustion need to be examined.

PURPOSIVE TANGIBILITY

Liu posits that the incidents of ‘transferability’, the ability to read, lend and transfer, result from “pre-existing understandings about what it means to own physical property”.⁹⁵ From this perspective, the associations between the notions of ownership, tangibility, and exhaustion obstruct the development of digital exhaustion.⁹⁶ Karapapa purports that these barriers — and by extension the restrictions imposed by the *Kabinet* ruling — can be overcome through a “purposive understanding of tangibility”.⁹⁷ This argument suggests that tangibility ought to be understood through two qualities that are “*incidentally* associated to [ownership]” — property alienation and non-substitutability.⁹⁸ Property alienation is best understood as a twofold notion of “transfer as well as estrangement”.⁹⁹ For example, if A sells X to B there is a transfer of X, but A is also now estranged from X as they cannot access it. Likewise, non-substitutability provides that “the resale of the ‘used’ copy should not substitute a sale of the original”.¹⁰⁰ Therefore, a meaningful equivalent of content ownership in the online environment could be created through a purposive understanding of tangibility.

ALIENABILITY AND FORWARD-AND-DELETE TECHNOLOGIES

In *Kabinet*, the CJEU maintained that the absence of technical measures which ensured “that only one copy of the work might be downloaded” posed a substantial threat.¹⁰¹ However, in consideration of the CJEU’s ruling that the ‘public’ was cumulatively substantial, one issue remains unresolved: whether a controlled resale of an eBook to a public that falls below the *de minimis* threshold would be limited by Article 3(1) of

2019 <<https://www.thebookseller.com/news/pa-welcomes-eu-court-ruling-e-book-exhaustion-rights-1140796>> [Accessed 28 Jul. 2020].

92 Kaiser, p.495.

93 Zhu and Moonhee, p.621; Mezei, *The Doctrine of Exhaustion in Limbo*, p.130, 144.

94 Rizzuto, p.113.

95 Liu, p.1336.

96 Karapapa, p.1.

97 Ibid.

98 Ibid., p.20.

99 Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works*. (London: Edward Elgar Publishing, 2011), p.215.

100 Karapapa, p.21.

101 Morgan, Abbot and Stothers, p.237.

Directive 2001/29. Mezei questions the applicability of the *Kabinet* ruling to a situation where “technical measures guarantee the accession of a single copy of a work by one end-user at a given time”.¹⁰² Kaiser posits that the use of a ‘one-copy one-user’ model would reconstruct a “digital form of scarcity”¹⁰³ — thereby reflecting property alienation in the digital market.¹⁰⁴ Consequently, a system with DRM robust enough to limit the communication of an eBook could potentially mean that there is no ‘public’, inferring that Article 3(1) quasi exhausts.¹⁰⁵

This approach does incur practical hurdles such as “proving the seller’s guarantee of incontestably deleting his or her copy”.¹⁰⁶ However, Mezei argues that the development of forward-and-delete technologies would enable the effective control of a transfer, and could help alleviate the risks associated with the indestructibility of digital copies.¹⁰⁷ Therefore, the threat posed by unrestricted communications to the public could be negated.

Similarly, Karapapa cites the use of blockchain technology to enable eBooks to be ‘owned’ and borrowed like a physical book.¹⁰⁸ Blockchains act as a means of tracking and verifying transactions securely and transparently in an unalterable public database thereby guaranteeing the transfer of access rights from seller to buyer.¹⁰⁹ Consequently, blockchain technology could be used to facilitate digital exhaustion as it allows digital property to be transferred in the same way as its physical counterpart.¹¹⁰ At the time of publication, one Japanese publisher is developing a blockchain-based platform to distribute eBooks in response to the lockdowns caused by COVID-19.¹¹¹ The publisher, Media Do, is testing the platform with *My Anime List*, enabling the resale of ‘used’ titles with a royalty being paid to the rightsholders.¹¹² Consequently, technological developments which ensure the resold copy is deleted upon transfer can be seen to increase the possibility of a digital equivalent to property alienation, enabling the transfer of eBooks in a way that could allow digital exhaustion.¹¹³

102 Mezei, *The Doctrine of Exhaustion in Limbo*, p.145.

103 Kaiser, p.492.

104 Clark and Phillips, p.20.

105 Morgan, Abbot and Stothers, p.237; Mezei, *The Doctrine of Exhaustion in Limbo*, p.145.

106 Kaiser, p.492.

107 Mezei, *The Doctrine of Exhaustion in Limbo*, p.139-40; Mezei, *Digital First Sale Doctrine Ante Portas*, p.56.

108 Karapapa, p.29.

109 Niels Peter Thomas, ‘Bookselling’ in *The Oxford Handbook of Publishing* by Michael Bhaskar and Angus Phillips, (Oxford: Oxford University Press, 2019) 399-408 (p.407); Perzanowski and Schultz, *The End of Ownership*, p.191; Meg Miller, ‘This Disintegrating E-Book Cleverly Shows How Blockchains Work’ *Fast Company*, 2017 <<https://www.fastcompany.com/90124578/this-disintegrating-e-book-cleverly-shows-how-blockchains-work>> [Accessed 31 Jul. 2020].

110 Horan, p.1859.

111 Shaurya Malwa, ‘Japanese eBook Publisher Turns to Blockchain for Distribution in the Pandemic Era’ *Blockchain.News.*, 2020 < <https://blockchain.news/news/japanese-e-book-publisher-blockchain-distribution-pandemic-era>> [Accessed 16 Aug. 2020].

112 Ledger Insights. ‘Japan’s Media Do explores blockchain for distribution of eBooks, manga, live events’ *Ledger Insights*, 2020 <<https://www.ledgerinsights.com/japan-media-do-explores-blockchain-for-distribution-of-e-books-manga-live-events/>> [Accessed 16 Aug. 2020].

113 Karapapa, p.21; Horan, p.1858.

NON-SUBSTITUTABILITY AND INCENTIVE CONCERNS

The introduction of digital exhaustion arguably risks unanticipated effects on copyright and the publishing industry. As Liu explains, “the transfer [...] of physical copies typically involves some degree of cost, and this cost serves to place a practical limit on the amount of transferring and sharing of physical copies that occurs”.¹¹⁴ In an online environment, the transfer of digital copies can be “nearly instantaneous, involving almost none of the physical-world costs”.¹¹⁵ Consequently, Liu argues that even where technological means could ensure digital alienability, the “ease of transfer of existing digital copies in the end might [cause] greater substitution of lending for purchasing and have a correspondingly greater impact on copyright incentives”.¹¹⁶ This innate element of a tangible product is referred to as non-substitutability as the form inevitably degrades in quality, and when resold, it does not cause direct competition with the market for new copies.¹¹⁷ In consonance with this, the US Copyright Office concluded that “the potential harm to the market [...] that would result from an extension of [the exhaustion doctrine] could substantially reduce the incentive to create”.¹¹⁸ Consequently, it is likely that the interest in preserving the incentive rationale that is central to copyright law will take precedence over transferability rights.¹¹⁹

However, Liu’s criticism of the right to transfer digital copies is focused on the “unqualified right to transfer” and in situations where “that transfer necessarily gives rise to the creation of another fixed digital copy”.¹²⁰ Such a situation would certainly undermine copyright incentives and the primary market for digital goods.¹²¹ Nevertheless, Liu continues to support a form of digital exhaustion that enables a limited right to transfer.¹²² In his review of eLending in public libraries, Seighart similarly emphasises the importance of recreating ‘friction’ for digital goods in order to reflect the physical market:

The interests of publishers and booksellers must be protected by building in frictions that set 21st-century versions of the limits to supply which are inherent in the physical loans market [...] These frictions include the lending of each digital copy to one reader at a time, that digital books could be securely removed after lending and that digital books would deteriorate after a number of loans.¹²³

Horan similarly argues the risk of substitutability in a digital second-hand market should be “a consideration to be balanced rather than a motive for the complete

114 Liu, p.1354-55.

115 Ibid.

116 Ibid.

117 Karapapa, p.21.

118 U.S. Copyright Office, p.88.

119 Liu, p.1351.

120 Ibid., p.1356-57.

121 Ibid., p.1351; Perzanowski and Schultz, *The End of Ownership*, p.182.

122 Liu, p.1337.

123 William Sieghart, *An Independent Review of eLending in Public Libraries in England* (London: Department for Culture, Media and Sport, 2013), p.13.

deprivation of expected ownership rights".¹²⁴ Expanding on the issue of copyright incentives, it has been suggested that the negative effects of downstream control could be alleviated through a system of resale remuneration for rightsholders.¹²⁵ As Mezei explains, voluntary remuneration systems, like the one Tom Kabinet and Media Do have imagined¹²⁶ — have the potential to “further ease tensions” between copyright holders and the platform providers.¹²⁷ Horan goes further, arguing that the current physical secondary market deprives authors, and that the opportunity for a ‘resale royalty’ in a digital second-hand market ought to be welcomed by creators in the digital economy.¹²⁸

6. CONCLUSION

Ultimately, digital exhaustion can be seen to threaten copyright incentives, thereby upsetting the balance of interests between the copyright-holder and the consumer. The *Kabinet* judgment evidences the claim that digital exhaustion presents too great a risk to rightsholders to become a reality in the current online market. However, on further examination of the CJEU’s ruling in *Kabinet*, it is clear that the possibility of an online second-hand market in the future has not been fully prohibited. By giving insufficient attention to technological development, critics have continued to doubt the long-term applicability of the *Kabinet* ruling in relation to the transfer of eBooks, and many continue to support the inclusion of an exhaustion doctrine in the digital market.

Furthermore, a purposive understanding of tangibility has been found to provide insight into digital exhaustion and the shape it takes in the contemporary market. When analysed through the lens of property alienation and non-substitutability, the emergence of forward-and-delete technology suggests that the concept of digital exhaustion is not beyond the realm of possibility. Importantly, in an environment where consumers value transferability, and technology can guarantee the legitimacy of resale/lending, there is the potential that publishers will face increasing pressure to expand personal property rights associated with an eBook purchase. Nevertheless, it must be acknowledged that not imposing a practical limit on transfers within a digital second-hand market risks substituting sales within the primary market, thereby threatening copyright incentives. Due to the ease of online transfers, a form of friction must be imposed in order to mirror the real-life costs of transferring a physical book.

124 Horan, p.1864.

125 Mezei, *Digital First Sale Doctrine Ante Portas*, p.55.

126 See also the case of *Capitol Records, LLC v. ReDigi Inc.*, USA. ReDigi utilised cloud computing to “allow users to store, stream, and sell verified music”, and gave “a portion of the proceeds of each sale to the artists themselves [sharing] 20% of the transaction fee with an artist whenever the artist’s track sells” (Horan, p.1853-54).

127 Mezei, *The Doctrine of Exhaustion in Limbo*, p.146.

128 Horan, p.1864; Lessig, p.106.

LIMITATIONS

It is anticipated that for future research, a focused analysis of the distinction between 'software' and 'media' may provide insight into the future of digital exhaustion within the publishing industry. As highlighted by the differing judgments in *Usedsoft* and *Kabinet*, the form a digital product takes and how it is used has significant implications on the personal property rights of the consumer. Furthermore, a wider discussion of eLending business models in libraries and the academic publishing sector may provide insight into how publishers can protect their interests whilst broadening digital personal property rights between private parties. It is hoped that the suggested lines of inquiry might contribute to the existing literature by enriching the discussion of digital exhaustion in the online marketplace.

FINAL THOUGHTS

In his book *The Content Machine*, Bhaskar concludes with the question, "who will do the reimagining – publishers themselves or networks beyond their control?".¹²⁹ This sentiment resonates with the risks outlined in this paper. As this case study evidences, the possibility of a digital second-hand market constitutes an unceasing question of balance. When pertinent factors are balanced appropriately, the doctrine of exhaustion has the potential to promote competition in the market and enhance the objectives of copyright law. However, if that balance fails to evolve at the same pace as the digital economy, exhaustion presents a substantial threat to copyright incentives and risks supporting anticompetitive practices. Ultimately, it is crucial that stakeholders in the publishing industry continue to interact with the issue of digital exhaustion in order to influence the policy that shapes their market.

129 Michael Bhaskar, *The Content Machine* (London: Anthem Press, 2013), p.196.

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