A *plaidoyer* for the relevance of copyright exhaustion

Copyright Exhaustion – Law and Policy in the United States and the European Union

Péter Mezei

Cambridge University Press

ISBN: 978-1-107-19368-0, hardback, p. 222

Price: £ 85

Bernd Justin Jütte

It is difficult not to commence this review with a pun, but indeed, Péter Mezei manages to ‘exhaustively’ summarize the current state on the exhaustion/first sale doctrine in his book “Copyright Exhaustion – Law and Policy in the United States and the European Union.” The book provides an excellent overview of the development of the doctrine in both jurisdictions and skilfully develops the principles he identifies along the way into a strong argument for a digital exhaustion doctrine.

With the ubiquity of digital content on the internet and a variety of ways to consume it, the desire to possess literary, musical or audio-visual works is still *à la mode*. It enables the repeated consumption of a particular work without the fear of being cut-off from access. It also enables users to open and operate on downstream markets in order to recuperate their initial investment. In the analogue domain the exhaustion doctrine enables users to resell or even give away their individual copies, whether this is possible with digital content is, at best, uncertain. Mezei addresses this important question, which has been consciously ignored by policy makers, but which is nevertheless of immense pertinence. The argument of the book is developed in four chapters that tie together neatly and lead the reader through the history and policy of exhaustion.

The author builds upon the theoretical underpinnings of the European exhaustion and the US first sale doctrine by revisiting their historical origins in an introductory chapter, and not without introducing the reader to the applicable international copyright framework. This section of the book is refreshingly short for an introduction to the following chapters of the book, but does not disappoint the interested expert as it provides wealth of references and, more importantly, a systematic overview of the conceptual elements of copyright exhaustion. The section also foreshadows the analysis of the principle of exhaustion as it operates at EU level and in the US. With this introduction readers from all levels of expertise are appropriately equipped to digest the rich analyses that follow.

Chapters two and three mirror each other in structure by providing, first, an overview of the history of each doctrine, second, and historical account of the respective developments in the EU and in the US, and third, limitations to the application of the doctrine. The EU Chapter traces the historical development of the doctrine from its origins in the EU Members States to its ultimate codification in various directives. Mezei provides a thorough overview of the case law of the Court of Justice of the European Union (CJEU) on copyright exhaustion in the light of the EU competition rules, the market freedoms and fundamental rights. He highlights the position of the CJEU that service-like uses, such as rental and TV retransmission were rules to be outside the scope of exhaustion. After briefly considering the policy discussion in the late 1980s, he tackles vertical harmonization as a reaction to the developing jurisprudence of the Luxembourg court, and horizontal harmonization in form of Directive 2001/29 pursuant the adoption of the TRIPS Agreement. The chapter concludes by looking at effective limitations to the exhaustion doctrine with cursory discussion restrictions of parallel imports and the *droit de suite*.

The US chapter can give a much more profound historical account. Due to the differences in the EU and US legal systems the examination of national case law is naturally much deeper. The big divides outlined in this chapter are the 1909 and the 1976 Copyright Acts. Around these beacons Péter Mezeit skilfully sketches the development of the US first sale doctrine. He then spends a significant part on the recent move of the US judiciary from a protective domestic first sale regime towards a regime of international first sale, which was confirmed in the US Supreme Court Ruling *Wiley & Sons v. Kirtsaeng* only in 2013. This discussion underlines the biggest difference between these two jurisdictions. While the US operate an international exhaustion doctrine, the EU maintains its market protective regime of EU exhaustion.

The heart of the book is its chapter 4, which traces the exhaustion/first sale jurisprudence in its application to digital content. Obviously, the author position his discussion between the two landmark cases of *UsedSoft* (EU) and *ReDigi* (US). Whereas in the EU, the CJEU permitted the resale of downloaded software, in the US as District Court refused to allow the resale of downloaded music. The much more interesting parts of these chapters are the national examples Mezei identifies that were decided after *UsedSoft* and *ReDigi*, and those that dealt with other subject matter, such as audiobooks and e-books and audio-visual works. He then moves on to make a number of fundamental and principled distinctions that have reoccurred in the case law of the courts. First, he draws a distinction between licenses and sales, suggesting that, disregarding the term used, a right to use for an infinite period for a one-time payment should allow the user to resell that digital content. Second, and because exhaustion/first sale tends to apply only to the distribution right, it is suggested that distribution can also cover digital content. Third, Mezei makes that argument that the reproduction right should not stand in the way of a digital exhaustion doctrine, simply because the transfer of digital content from one user to another requires acts of reproduction. Finally, the author argues that exhaustion should apply to all types of content and the law should not differentiate between software, music, or other types of content. In his final analysis, Mezei makes a *plaidoyer* for digital exhaustion. He does not consider the discussion on digital exhaustion moot only because consumption models currently tend toward streaming and subscription services but instead reaffirm its pertinence. While rejecting a “traditional positivism” that has resulted in a very restrictive and rule-based interpretation of the exhaustion doctrine Mezei favours a “constructive realism” that considers the economic, social and technological effects of a digital exhaustion doctrine. The technological opportunities available today, so Mezei could safeguard that a socially desirable exhaustion doctrine would not work to the economic detriment of authors is the final conclusion of this remarkable book. This chapter is worth the read if only for his final conclusions, which should not distract from the masterful analysis of the exhaustion doctrine on both sides of the Atlantic

Péter Mezei provides strong policy arguments that let the reader see beyond the strict letter of the law. The reasoning is convincing and it identifies points for attachment in the ongoing policy process at EU level which saw the introduction of the notion of ‘digital goods’ and room for digital exhaustion in the international legal framework. Most importantly, however, it debunks the arguments of the opponents of a digital exhaustion doctrine and comes at a time when the exhaustion doctrine will soon be re-examined by the CJEU.

Due to its comprehensiveness and the precision of its reasoning is certain to gain the attention of experts and students of the exhaustion doctrine. For the former as a rich resource for further research and a sharp analysis of t +he current state of law and policy, for the latter as an excellently written and easily accessibly review oft he ‘state of the art’ supplemented with a well-reasoned argument for the viability and continued necessity of a robust exhaustion doctrine in a digital environment.