

# Development of a Secondary Market for E-books

## The Case of Amazon

by Liliia Oprysk, Raimundas Matulevičius and Aleksei Kelli\*

**Abstract:** The justification of applying the exhaustion doctrine to intangible copies of copyright protected works is widely discussed in scholarly circles. The discussion mainly concerns the relevant provisions of the international treaties and rationale of the exhaustion doctrine under EU law. However, little attention is paid to the question regarding how the potential outcome is comparable to the one exhaustion brings in the analogue world. This article goes beyond the theoretical legal discussion and presents a case study of e-books disseminated through Amazon. The authors analyse the legal, technological and organisational challenges of

creating a secondary market. In line with the identified challenges, this paper presents two scenarios based on the particular circumstances observed at the Amazon distribution solutions. The first presupposes the creation of a limited secondary market within Amazon. The second enables a broad secondary market of e-books purchased through different channels, including Amazon. The two scenarios could potentially be combined to achieve a secondary market of e-books in a controlled manner. This would allow vendors to keep nearly the same degree of control over distributed copies while serving consumer interests and creating the Digital Single Market.

**Keywords:** Copyright; digital exhaustion; e-books; Amazon; digital single market

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Recommended citation: Liliia Oprysk, Raimundas Matulevičius and Aleksei Kelli, Development of a Secondary Market for E-books: The Case of Amazon, 8 (2017) JIPITEC 128 para 1.

## A. Introduction

- 1 The modern copyright law serves multiple objectives. It aims to protect the author's interests, facilitate dissemination of knowledge, and support societal development. As copyright protection evolved and exclusive rights extended in their scope, the need to balance them with the interests of third parties and society in general arose. The exhaustion doctrine is one of the examples where the introduction of a broad exclusive right of a copyright holder is in most cases accompanied by the principle of exhaustion of the right upon meeting certain conditions.
- 2 On the one hand, copyright provides a monopoly, which restricts competition and the circulation of goods. The European Single Market is based on the free movement of goods,<sup>1</sup> and thus, it is dependent

on the restrictions imposed on the exclusive rights. While the Single Market is a reality for physical goods, the Digital Single Market is in its infancy. Therefore, the establishment of this market is a priority task for the European Commission according to the Digital Single Market Strategy.<sup>2</sup> It aims, inter alia, to provide

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IT Law at the University of Tartu (Estonia), Dr. Raimundas Matulevičius is an Associate Professor of Software Systems at the University of Tartu, and Dr. Aleksei Kelli is an Professor of IP Law at the University of Tartu. This research has received funding from the Centre for the Information Society at the University of Tartu.

- 1 See the Consolidated Version of the Treaty on the Functioning of the European Union. Available at <[http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF)> (8.5.2017).
- 2 European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe. Brussels, 6.5.2015. COM(2015) 192 final. Available

\* Liliia Oprysk is a Junior Research Fellow and PhD student of

better access for consumers and businesses to online goods and services across Europe by rapid removal of the key differences between online and offline worlds.

- 3 The article concentrates on the free movement of digital goods. In particular, it focuses on the secondary market of e-books, since it constitutes a widespread basis for comparison of tangible and intangible goods. The authors rely on the EU *acquis* and use the e-books disseminated through Amazon as an example. The goal of the article is to identify the main challenges to the Digital Single Market of e-books (based on the case of Amazon) and suggest the possible steps to overcome them by combining legal, organisational and technological measures. This paper sets out to argue that the challenges relating to the resale of e-books can be overcome only if various legal, technological and organisational aspects are taken into account.
- 4 The article is organised into four main sections. In the first section, the authors address the nature of the exhaustion principle and its role in facilitating the EU Single Market. The second section provides an overview of the dissemination model for e-books adopted by Amazon. These serve as a basis for the analysis of a number of legal, technological and organisational challenges of reselling e-books, discussed in the third section. The fourth section identifies the possible scenarios for enabling a secondary market for e-books by combining legal and non-legal measures.

## B. Exhaustion Doctrine at International and EU Levels

- 5 The author's exclusive right of distribution was recognised at the international level rather late.<sup>3</sup> Shortly after, it became subject to EU harmonisation under the Copyright Directive.<sup>4</sup> Article 4(1) of the Directive obliges the EU Member States to provide authors with an exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise of a work or its copy. While high-level protection forms a basis for the EU harmonisation in the field of copyright as rights are believed to be crucial to intellectual creation, dissemination of

at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN> (8.5.2017).

- 3 There is no general right of distribution under the Berne Convention. The only international treaty providing for a right of distribution for all types of works is the WIPO Copyright Treaty signed in 1996.
- 4 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167, 22.6.2001.

works is another objective, which nevertheless must not be achieved by sacrificing strict protection.<sup>5</sup>

- 6 It is commonly accepted that the broad right of distribution is to be limited to the initial distribution of the work or copies thereof.<sup>6</sup> In many jurisdictions<sup>7</sup> it is achieved by the exhaustion principle, which provides that the right to authorise distribution is exhausted upon a copy or work being put into circulation with the right holder's authorisation. Conditions that must be met are not extensively regulated at the international level. Article 6 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>8</sup> sets forth that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights". According to a Commentary on the Agreement, "Article 6 disclaims any intent in the TRIPS Agreement to limit the Members' freedom to regulate the issue of exhaustion of rights with regard to all types of IPRs".<sup>9</sup> Elsewhere, according to the WIPO Copyright Treaty (WIPO CT), countries are free to determine conditions under which the right of distribution is exhausted upon the first sale or other transfer of ownership of the original or a copy of a work with the author's authorisation.<sup>10</sup>
- 7 Prior to the harmonisation of certain copyright-related matters at the EU level, the distribution right and exhaustion under the national laws was scrutinised by the Court of Justice of the European

5 Directive 2001/29/EC, recitals 9 and 22.

- 6 For earlier discussions on the introduction of the right of distribution and exhaustion, see T. Hesser. Intellectual Property Conference of Stockholm, 1967: The Official Program for Revising the Substantive Copyright Provisions of the Berne Convention. Bulletin of the Copyright Society of the U.S.A 14 (4) 1967. p. 281; Records of the Intellectual Property Conference of Stockholm 1967. WIPO 1971. Vol. 2. pp. 853-854. In the context of WIPO CT and TRIPS, see Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996. pp. 35-37; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman's Report to the GNG. MTN.GNG/NG11/W/76 1990. p.8.
- 7 Probably, it concerns most of the countries. France is a notable exception, where the distribution right is derived from the right of reproduction.
- 8 The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. Available at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) (8.5.2017).
- 9 C. M. Correa, Trade Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement. Oxford University Press, 2007, p. 78.
- 10 WIPO Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295157](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157) (8.5.2017). art. 6.

Union (CJEU) in the context of the free movement of goods within the Community.<sup>11</sup> As the right of distribution conflicts with free movement in general, the exhaustion doctrine served as an instrument to facilitate it, provided that national laws did not unjustifiably partition the market. For instance, restricting the exhaustion principle to the territory of a particular country was regarded as incompatible with the free movement of goods within the Community.<sup>12</sup> In the course of copyright harmonisation, there were divergent views on whether the Member States should be free to decide on the territoriality of exhaustion as long as it was not restricted to national borders.<sup>13</sup> Preventing parallel importation from countries outside the Community constituted the main justification behind precluding the Member States from exercising international exhaustion.<sup>14</sup>

8 The commencement of the EU copyright harmonisation process also marked the enactment of the conditions of exhaustion within the EU.<sup>15</sup> Consequently in the EU, the right to authorise distribution is exhausted upon the sale or any other transfer of ownership of a particular copy or the original of the work within the Community<sup>16</sup> with the authorisation from the right holder.<sup>17</sup> The exhaustion of distribution rights has been applied only to copies or works fixed on tangible medium, with the exception of software.<sup>18</sup> Some scholars believe that provisions of the WIPO CT,<sup>19</sup> on which

the Copyright Directive is partially based, prevents the application of exhaustion to intangible copies.<sup>20</sup>

9 Interpretation of the WIPO CT and the respective Copyright Directive provisions is not considered in this paper. On the one hand, the CJEU has stated that the exhaustion doctrine under the EU Software Directive<sup>21</sup> is applicable to the software delivered by download.<sup>22</sup> On the other hand, in the recent VOB decision,<sup>23</sup> the CJEU held that the lending right under the Rental and Lending Rights Directive<sup>24</sup> also covers lending of e-books. Accordingly, the Court in at least two separate occasions has adopted the functional approach and stressed the need to observe the purpose of exceptions to safeguard the effectiveness when applying them to circumstances which could not have been taken into account at the time of adoption.<sup>25</sup> The Proposal of the European Commission (EC) to amend the VAT Directive would allow the Member States to apply reduced VAT rates to e-publications along with printed ones. This proposal indicates that there might be other measures outside of copyright that remove the differences between offline and online worlds.<sup>26</sup>

10 Consequently, the exhaustion principle restricting

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that for the purpose of these articles copies or originals of works refer exclusively to fixed copies that can be put into circulation as tangible objects.

11 In principle, restrictions on the free movement of goods or measures having equivalent effect are prohibited (Art. 35, 36 TFEU). Certain derogations are nevertheless possible provided that they do not constitute arbitrary discrimination, see Art. 36 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

12 See CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*. (1971) Case C-78-70; *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) Joined cases C-55/80 and C-57/80.

13 See Economic and Social Committee's Opinion on the proposal for a Council Directive on the legal protection of computer programs 89/C 329/02. OJ C 329, 30 December 1989. pp. 6-7.

14 See the Follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final, 20 November 1996. p.18.

15 It was codified for the first time in the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. OJ L 122, 17 May 1991.

16 The Community has to be understood as the European Economic Area (EEA) after coming into force of the Agreement on the European Economic Area, OJ L 1, 3.1.1994.

17 Directive 2001/29/EC, art. 4(2).

18 CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11. The CJEU held that right of distribution of a copy of a computer program is exhausted upon authorised download of a copy accompanied by a permission to use that copy for unlimited period. See para. 72.

19 The Agreed Statement on Articles 6 and 7 which provides

20 For a view that WIPO CT precludes application of exhaustion to intangible copies, see P. De Filippi. *Copyright in the Digital Environment: From Intellectual Property to Virtual Property*. 7th International Workshop for Technical, Economic and Legal Aspects of Business Models for Virtual Goods, 2009; For a view that a work only has to be capable of being put into circulation as a tangible object, but not actually distributed as a tangible object, see F. Ruffler, *Is Trading in Used Software an Infringement of Copyright? The Perspective of European Law*. *European Intellectual Property Review* 33(6) 2011; For a view that it constitutes only a minimum requirement and exception for intangible copies can also be introduced following the three-step-test, see. T. Dreier, P. Bernt Hugenholtz (eds). *Concise European Copyright Law*. 2<sup>nd</sup> rev. ed. Kluwer Law International 2016.

21 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. Official Journal L 111, 5.5.2009.

22 CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11.

23 CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (2016) Case C-174/15.

24 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Official Journal L 376, 27.12.2006.

25 *Ibid.*, para. 50, 42.

26 The earlier application of the reduced VAT rates was held incompatible with the VAT Directive in the *Commission v France* judgment by the CJEU. See Proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals. COM(2016) 758 final. 1.12.2016; CJEU, *Commission v France* (2015) Case C-479/13.

the right of distribution contributes to the removal of barriers to the EU Single Market indicating free movement of goods within its borders. In the context of literary works protected by copyright, free movement also facilitates the dissemination of knowledge and culture within the Community. Goods distributed in one Member State can reach consumers situated in another Member State. This also allows lowering of the price, which generally widens the market and makes works affordable to consumers with high elasticity of demand.

- 11 The situation is, however, different for intangible goods. Firstly, intangible goods are often treated differently from their tangible counterparts, also in the fields other than copyright.<sup>27</sup> Secondly, in the absence of legal certainty about the application of the exhaustion doctrine to copies distributed without a tangible medium, there is no apparent secondary market for intangible goods. Thirdly, the nature of intangible goods allows controlling dissemination of copies by technical protection measures<sup>28</sup> irrespective of the applicability of the exhaustion doctrine.
- 12 The next part of this paper deals with the dissemination of a particular type of an intangible good – an e-book. Above all, it addresses e-books distributed by Amazon. It also considers the way in which specific conditions influence the possibility of achieving EEA-wide secondary market.

### C. Dissemination of E-Books Through Amazon

- 13 According to the study carried out in 2014, a market share of e-books in a given EU Member State amounts to 11.5 percent of the market of books.<sup>29</sup> In turn, Amazon's share of the e-book market is high (up to 79 percent in some Member States).<sup>30</sup> The company established its presence in the EU by opening separate marketplaces for particular Member States. These marketplaces are accessible to residents of these and neighbouring countries sharing the same language.<sup>31</sup> Accordingly, the residents of 10 Member

States are able to choose whether to buy e-books from a dedicated marketplace or from the worldwide one. The analysis of top 100 e-books for each of the dedicated marketplaces showed that the lists comprise almost exclusively e-books in the language of a country and there is little overlap between the titles offered across these marketplaces.<sup>32</sup>

- 14 Amazon Kindle Store<sup>33</sup> facilitates the distribution of e-books published both by professional publishers and by individuals resulting in a variety of offerings. In this paper, whenever references are made to the procedure of placing an e-book on a marketplace, dissemination of e-books by self-publishers through Kindle Direct Publishing (KDP) service is meant. A publisher can choose whether to make an item available on particular marketplace(s) only, to offer it world-wide, or both. E-books can be put on a market in different languages, although there is a conclusive list of supported languages for the global marketplace if an e-book is published by a self-publisher through KDP. As a result, e-books written in Cyrillic are accessible on the Kindle store, but offered only by recognised publishers.
- 15 A submitted item (e-book) meeting the criteria<sup>34</sup> is made available on the Kindle store within 48 hours. Royalties for copies purchased by consumers through the Kindle store depend on the quantity sold and are calculated as a fixed percentage of a price exclusive of VAT and less of delivery cost if a higher level of royalties is chosen.<sup>35</sup> Amazon charges publishers delivery costs for each copy of an e-book, which depends on the region, the e-book's price, and the size of a copy.<sup>36</sup> There have been occasions where Amazon offered free shipping of e-books, which was challenged in certain jurisdictions, however.<sup>37</sup>

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In total, residents of 10 Member States have access to dedicated marketplaces, e.g. Austria can access the German one.

<sup>27</sup> As example, see the above cited case CJEU, *Commission v France* (2015) Case C-479/13.

<sup>28</sup> Circumvention of such technical protection measures is generally prohibited, see Directive 2001/29/2001. Art. 6.

<sup>29</sup> R. Wischenbart. *Global eBook: A report on market trends and developments*. Rudiger Wischenbart Contents and Consulting 2014. Available at <[http://www.wischenbart.com/upload/1234000000358\\_04042014\\_final.pdf](http://www.wischenbart.com/upload/1234000000358_04042014_final.pdf)> (8.5.2017). p. 21.

<sup>30</sup> 79% in the UK, 43% in Germany, 40% in Spain. See *supra* note.

<sup>31</sup> At the moment, there are 6 dedicated marketplaces – for Germany, France, Spain, Italy, UK and the Netherlands.

<sup>32</sup> M. Batikas, E. Gomez-Herrera, B. Martens. *Geographic Fragmentation in the EU Market for e-Books: The case of Amazon*. Institute for Prospective Technological Studies Digital Economy Working Paper 2015/13. JRC98022. p. 7.

<sup>33</sup> The name of an online marketplace provided by Amazon.

<sup>34</sup> See more at <<https://kdp.amazon.com/help?topicId=A17W8UM0MMSQX6>> (8.5.2017).

<sup>35</sup> Delivery Cost for 70% royalty option available at <<https://kdp.amazon.com/help?topicId=A29FL26OKE7R7B>> (8.5.2017).

<sup>36</sup> It is unclear what exactly Amazon's delivery cost consists of besides the cost of transferring bytes through the network. Some suggest that it includes also the cost of on-demand creation of copies and encryption, i.e. cost of server resources necessary to carry out operations.

<sup>37</sup> In 2007, the French Court ruled that shipping costs are part of a price for an e-book and fined Amazon for offering e-books at a price lower than 95% of the retail price set by the publisher, which is prohibited by law. *Syndicat de la Librairie Française v Amazon.fr*. Cour administrative d'appel de Versailles, 3ème chambre, du 11 décembre 2007.



- 16 It is possible to engage in price discrimination to maximise the profit by charging different prices for an e-book in different markets. Although generally a publisher can decide on a price himself or use the Amazon service, subscribing to a higher level of royalties means that Amazon will manage the prices itself and decrease them if an e-book is offered at a lower price elsewhere.<sup>38</sup> To qualify for a higher royalty rate, the publisher also has to meet certain price criteria and to offer an e-book at a price that is at least 20% lower than the price for a printed copy.<sup>39</sup> An average e-book price differs considerably among marketplaces. The same is true for a particular e-book, which is sold at different prices that do not depend solely on the VAT applicable in the country.<sup>40</sup>
- 17 E-books are sold to individual users, one copy per Kindle account, with a possibility to view its content simultaneously on multiple devices associated with an account.<sup>41</sup> However, the bulk sale of e-books is a recently introduced option, which is currently only available in the US.<sup>42</sup> Amazon's service Whispercast allows customers to purchase multiple copies of an e-book at the same time and their subsequent distribution between individual Kindle accounts.<sup>43</sup> E-books purchased through Whispercast can be used for educational purposes or also within business entities, as the platform allows distribution of own content along with purchased e-books.
- 18 Publishers of e-books - either professional or self-publishers - have an option to apply the Digital Rights Management technique (DRM) to copies of their e-books upon creation to restrict certain uses of an e-book. Typically, the choice of a specific DRM technique will depend on the format of an e-book as different DRM technologies are seldom compatible with the variety of e-book formats, and further options will depend on the publisher's will. Most DRM systems attempt to protect the provider's profit and disregard user convenience.<sup>44</sup> For e-books disseminated through Amazon, DRM can be applied upon putting an e-book on a marketplace and cannot be reversed for that specific title later on.<sup>45</sup>
- 19 As e-books are not tied to a specific device, but to a Kindle user account, its content can be read simultaneously from different devices as long as they are connected to the same account. There are, however, certain restrictions - a single e-book cannot be loaded into more than 6 devices at the same time. DRM also does not allow access to an e-book other than through the Kindle application, thus preventing manipulating a copy, including its transfer. One-time lending option of 14 days is available if authorised by the publisher.<sup>46</sup> Lending an e-book makes it unusable for the consumer who purchased it until it's returned automatically within 14 days, so a copy is available for one account at the time.
- 20 In conclusion, Amazon maintains a highly centralised system for the distribution of e-books supplied by professional and self-publishers. The control over copies is exercised to the extent that one copy is associated with one account, but can be read from multiple devices as long as they belong to the same account. Apart from reading, a consumer cannot dispose of a purchased copy as it can only be accessed through special software and may not be transferred to a different account, except for the purpose of a one-time lending option. This does not constitute a transfer in a technical sense as the content is synchronised to a device associated with a different account and becomes unavailable for the primary one. The next section examines how the conditions of dissemination directly challenge the Digital Single Market.
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- See more at <https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-versailles-3eme-chambre-jugement-du-11-decembre-2007/> (8.5.2017).
- 38 Standard royalty amounts to 35% of the e-book price, but can also be as high as 70% for certain markets if the publisher meets certain conditions. See more at <https://kdp.amazon.com/help?topicId=A30F3VI2TH1FR8.> (8.5.2017).
- 39 For details, see <https://kdp.amazon.com/help?topicId=A301WJ6XCJ8KW0.>; <https://kdp.amazon.com/help?topicId=A30F3VI2TH1FR8#70> (8.5.2017).
- 40 Amazon uses rapid responding price algorithms. See more M. Batikas, E. Gomez-Herrera, B. Martens. Geographic Fragmentation in the EU Market for e-Books: The case of Amazon. Institute for Prospective Technological Studies Digital Economy Working Paper 2015/13. JRC98022. pp. 8-9.
- 41 Amazon started offering Kindle Unlimited, currently available in the EU in Germany, UK, Italy and Spain. It allows consumers to read unlimited number of e-books for a monthly fee. Nevertheless, not all the e-books are available on the Kindle Unlimited and only a limited number of e-books can be read simultaneously. See <https://kdp.amazon.com/help?topicId=AA9BSAGNO1YJH> (8.5.2017).
- 42 For retailers other than Amazon offering bulk sale, see Ganxy <http://get.ganxy.com/howitworks-sell-bulk/> (8.5.2017).
- 43 See more at <https://whispercast.amazon.com/> (8.5.2017).
- 44 Q. Li, J. Zhang, X. Gong, Z. Zhang. A Novel License Distribution Mechanism in DRM System. 22<sup>nd</sup> International Conference on Advanced Information Networking and Applications. IEEE Workshop 2008. p.1329.
- 45 See more at <https://kdp.amazon.com/help?topicId=A2OSMOLQXXKIR2> (8.5.2017).
- 46 For lending option, see <https://kdp.amazon.com/help?topicId=A2P1X97KAW8GZE> (8.5.2017).

## D. Challenges to the Digital Single Market of E-Books and Secondary Market Thereof

21 Admittedly, the dissemination of e-books is rather different from that of printed ones. Since the exhaustion doctrine was formulated and enacted in legal provisions at a time when the market consisted mainly of tangible goods and the dissemination of copyright protected works required a separate tangible medium,<sup>47</sup> there are challenges to applying its logic to copies lacking durable medium.<sup>48</sup> Those challenges are of legal, technological, and organisational character. The emergence of a secondary market is not self-evident even if we assume that the exhaustion doctrine applies to copies lacking tangible support in the same way it does to tangible copies. For a secondary market to exist, consumers must be able to enter the market, offer their copies for sale, and effectively transfer them. This part of the paper deals with the variety of challenges facing a secondary market.

### I. Legal Challenges

22 One of the cornerstones of the exhaustion doctrine, and copyright in general, is the concept of a copy. According to Article 4(2) of the Copyright Directive, a copyright holder's right to control the distribution of a copy of a work or its original is exhausted upon a sale of that copy. Accordingly, a copyright holder's right is exhausted only in regard to a specific copy distributed by sale or otherwise and not the work in general. Creation of copies is at the heart of Internet and network transmissions. In principle, every act of reproduction of a copyright protected work is subject to the right holder's authorisation. Whereas the problem of an overly broad interpretation of the reproduction right was to a certain extent tackled by providing an exception for reproduction taking place in the course of digital transmission,<sup>49</sup> it is not the case for the concept of a copy as a whole.

<sup>47</sup> Broadcasting, performance and other ways of communicating a work without providing a copy for disposal fall outside the scope of this paper.

<sup>48</sup> To be precise, there is always a tangible medium behind a copy of a work – be it the device where it is stored and from which it can be accessed, a remote server etc. This medium, however, does not have such a distinctive character as a printed copy of a book has. For instance, the physical embodiment of a printed book serves the sole purpose enabling a consumer to enjoy the work, unlike a computer/server/device which is being used in many ways.

<sup>49</sup> Temporary acts of reproduction transient or incidental, which form an essential part of the technological process enabling digital transmission or lawful use, are exempted from acts falling under the reproduction right of the author according to Art. 5(1) of the InfoSoc Directive.

23 A digital copy lacks most of the features of a tangible medium which for a long time was seen as the only means to distribute a work. First of all, it lacks clear boundaries. An intangible copy is often perceived as a file of certain format which, with the use of a particular device and software, allows end-users to consume a work. However, a file is simply an identifier of a place on a hard-drive where specific bytes containing information in a binary code are stored. There might be multiple identifiers (files) pointing to the same sequence of bytes, as there might be links across the computer file system to the same location on a hard-drive. Thus, instead of associating an intangible copy with a file, it would be more logical to tie it to the bytes instead. This approach would, however, be undesirable as it would require technical knowledge to assess whether multiple copies exist on a same drive and whether a copy was manipulated.

24 The notion of a digital copy warrants further research. The CJEU in the *UsedSoft* case partially addressed the notion of a copy and how it translates into the digital environment. *UsedSoft* resold software licences without providing a copy as such; the subsequent acquirer downloaded it from the vendor's webpage and used it with the acquired licence. Hence, the obtained copy was not technically the copy originally acquired. However, for the purpose of applying the exhaustion principle under the Software Directive, it was sufficient that the subsequent acquirer obtained a licence and downloaded a copy from the vendor's webpage. The approach of separating a copy from an acquired licence would indeed be helpful for the secondary market of e-books. The recent CJEU judgment in *Vasiļevičs*<sup>50</sup> suggests that it is indeed the way to go, as it precludes the resale of backup copies of software. Furthermore, it is in breach of the vendor's copyright to upload backup copies for resale, but not to "sell" licence rights to a copy and direct the acquirer to the vendor's webpage to download a copy in line with the *UsedSoft*.

25 Another requirement for exhaustion to occur is the sale or any other transfer of ownership of a copy. As most intangible goods are being licenced rather than sold according to the Terms of Use of online marketplaces, the CJEU had the chance to rule whether a transaction where a copy of the software was downloaded from the vendor's webpage upon concluding a licence agreement constituted a sale or its equivalent. The licence agreement in question granted the user, in return for payment of a fee, "a right to use that copy for an unlimited period".<sup>51</sup> Therefore, the CJEU reasoned

<sup>50</sup> CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra, Microsoft Corp.* (2016) Case C-166/15. para. 53-54.

<sup>51</sup> CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012)

that making a copy available and the conclusion of a user licence agreement was designed to make a copy permanently usable by the customer and to remunerate the vendor.<sup>52</sup> Consequently, such a transaction was deemed to “involve the transfer of the right of ownership of the copy”.<sup>53</sup>

- 26 The Terms of Use of Amazon Kindle Store specify that “Kindle Content is licensed, not sold, to you by the Content Provider”<sup>54</sup> and that “Upon your download of Kindle Content and payment of any applicable fees ... the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times ... solely for your personal, non-commercial use.”<sup>55</sup> On the other hand, next to a particular e-book on the Kindle Store the consumer is exposed to a “Buy now with 1-Click” button, suggesting that it is indeed a sale of an e-book which takes place. It is indisputable that a copyright holder’s right in a protected subject matter as such is sold neither in the case of e-book distribution nor upon a sale of a printed copy. However, if one follows the logic applied by the CJEU in the *UsedSoft*, purchasing e-books on Amazon Kindle Store could presumably be qualified as transfer of ownership of a copy.
- 27 Another point of concern is the territoriality of copyright and exhaustion doctrine. As the Copyright Directive establishes regional EEA-wide exhaustion, the distribution right can only be exhausted in respect of the copies which are put into circulation with the right holder’s authorisation within the EEA. Accordingly, it is necessary to keep track of the initial transaction of sale to determine whether a particular copy can be put on a secondary market. Addressing this aspect requires consideration of a number of legal, technical and organisational measures. From the legal perspective, it might be worth to evaluate the necessity of maintaining regional exhaustion for intangible goods such as e-books. Given the absence of an agreement on justifiability of maintaining a regional exhaustion, it might be insightful to study the impact of international exhaustion on a potential secondary market of intangible copies. There may be a case for promoting greater cultural diversity within the EEA by allowing the import of e-books purchased outside its borders, which are otherwise not accessible on the EU market.
- 28 It follows that the key legal issues for a secondary market of e-books are dependent on the legal interpretation, creation of the EU-wide legal

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Case C-128/11, para. 45.

52 Ibid.

53 Ibid., p. 46.

54 See <https://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> (8.5.2017).

55 Ibid.

concepts and policy choices. As indicated in this part, the absence of a clear position on the concept of an intangible copy is one of the main obstacles to further discussions, as manipulating such copies for the purposes of transfer to subsequent acquirers falls within the exclusive rights of right holders. The same applies to the sale or transfer of ownership requirement. Extending the *UsedSoft* approach - where perpetual licences were deemed to constitute a transfer of ownership - would further benefit the secondary market and eliminate uncertainties. As the CJEU rightly stated, online transmission is functionally the equivalent of supply in a tangible medium. Where the effect of such a transmission is the same as of transfer of possession over a tangible object, the form of contractual arrangements should not be decisive in determining whether a transfer of ownership occurs.

## II. Technological and Organisational Challenges

- 29 The disposal of an acquired copy of an e-book through sale in most of the cases presupposes the ability to manipulate a copy itself. The most important action for a secondary market is the transfer of a copy either between the storage devices or over the Internet. In a centralised system, such as the one Amazon has, this is particularly restricted. The transfer between the storage devices associated with the same user account is actually happening through the Internet and there is no transfer in a technical sense - a copy of an e-book is synchronised to a “new” device and the synchronised content is removed from the “old” one by delisting an e-book or untying the device from an account. There is no option to extract an e-book from a Kindle device or application in order to transfer it, for instance, to a memory stick. Amazon’s proprietary e-book format and the DRM measures prevent this from taking place. It is possible to use software built to circumvent these technical measures; however, such acts are prohibited under EU copyright law.<sup>56</sup>
- 30 Another challenge, which stems from the territoriality of copyright protection and the exhaustion principle, is the need to keep track of the location where the transfer of ownership takes place. According to current EU legislation, the rights of copyright holders are exhausted in respect of the copies for which the first sale occurred within the EEA. Thus, there has to be a mechanism of ensuring that copies of an e-book put on a secondary market were originally put into circulation within the EEA. Watermarking technology could be one of

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56 For provisions on circumvention of technical measures, see Art. 6 of the InfoSoc Directive.

the possible options. Despite the fact that it is not protecting content from being copied, watermarking allows to pass on certain information with each copy, and subsequently, trace it.<sup>57</sup>

- 31 There are a few potential approaches to control access to an e-book through the DRM technologies, which take into account the geographical location along with the environmental and organisational settings. For instance, the Attribute-based access control (ABAC)<sup>58</sup> grants access to objects after assessing permission rules against the attributes of subjects and objects, operations, and the environment. The access decision depends on the comparison of the attribute values of a potential reader of an e-book to the copy itself. Another access control model - usage control model (UCON)<sup>59</sup> is based on the monitoring of the use of the resource (e.g. an e-book), which enables enforcing change of the access permissions and re-assessment of the subject's rights, e.g. when the owner of the copy is changing. The final access decision is made by re-assessing the authorisation, obligation and condition constraints by using the specified access rights.
- 32 Another dynamic model - Risk-adaptive access control (RAdAC)<sup>60</sup> - has the property of adapting access permissions based on the continuous changes in the environment. The permission is granted after estimating the situational factors and assessing the dynamism of the environment; hence, the access permission depends heavily on the changes in the environment. This is especially relevant for the digital right management of e-books when the change in the possession of a copy is taken into account. The use of different access control schemes could potentially help manage the access rights when the owner of a copy, territorial access, or any other environmental properties are changing. However, determining properties of the environment, user,

operational and technological components remains a development challenge.

- 33 Although the sale of multiple copies of an e-book is not a widespread practice yet, it could gain importance in the future. Amazon Whispercast, which was briefly discussed above, allows the purchase of multiple copies of an e-book with further distribution of the copies between individual Kindle accounts. The question would be whether individuals who also possess a copy of an e-book which they were granted access to by Whispercast administrator account,<sup>61</sup> would be able to rely on the exhaustion doctrine to sell these copies, or whether it is solely the owner of a Whispercast administrator account who can resell the copies. Unlike printed books, where the owner of multiple copies loses control over the copies he sells, an administrator of Whispercast retains control and can withdraw a copy from individual accounts.
- 34 It follows firstly, that technological and organisational challenges arise mainly from the difficulties in meeting the legal criteria for copyright exhaustion to occur. Secondly, they result from the adopted business practices and technological solutions implemented to serve these practices and also to comply with the legal regulation. Accordingly, when analysing the possible scenarios to facilitate a secondary market of e-books - in this case purchased through Amazon - it is necessary to consider all the challenges collectively. As suggested in the next section, it does not seem realistic to facilitate a broad secondary market by solely imposing the exhaustion doctrine on e-books (or intangible goods in general). Therefore, also the option of a limited secondary market (within Amazon) is considered.

## E. Possible Scenarios of Facilitating Secondary Market of E-Books Sold Through Amazon

### I. Limited Secondary Market Within Amazon

- 35 Amazon's ability to manage distribution of e-books centrally is, of course, in conflict with consumer interests to dispose of a purchased copy.<sup>62</sup> Certain

57 For more, see W. Li. Research on the application of watermark technology in digital works' electronic business. 2012 2nd International Conference on Consumer Electronics, Communications and Networks 2012. p.1252.

58 See V.C. Hu, D. Ferraiolo, R. Kuhn, A. Schnitzer, K. Sandlin, R. Miller, K. Scarfone. Guide to Attribute Based Access Control (ABAC) Definition and Considerations. Tech. Rep. 800-162, NIST Special Publication 2014. Also V.C. Hu, D. Kuhn, D.F. Ferraiolo. Attribute-based Access Control. Computer, 2015. Available at <<https://pdfs.semanticscholar.org/f2d6/98c5a1819b0cfff0c8899b8a391c5721aa2b6.pdf>> (8.5.2017). pp. 85-88.

59 J. Park, R. Sandhu. The UCON ABC Usage Control Model. ACM Transactions on Information and System Security (TISSEC) 7(1), 2004. pp. 128-174.

60 See R.W. McGraw. Risk-adaptable access control (RAdAC). In: Privilege (Access) Management Workshop. NIST 2009. Available at <[http://csrc.nist.gov/news\\_events/privilege-management-workshop/radac-Paper0001.pdf](http://csrc.nist.gov/news_events/privilege-management-workshop/radac-Paper0001.pdf)> (8.5.2017). Also R.A. Shaikh, K. Adi, L. Logrippo. Dynamic Risk-based Decision Methods for Access Control Systems. Computers and Security 31(4), 2012. pp. 447-464.

61 An administrator account in Whispercast is the one purchasing multiple copies and administering their dissemination between individual accounts. See more at <<https://whispercast.amazon.com/terms>> (8.5.2017).

62 Especially when the content is removed on the Amazon side without the consumer being aware. See as an example <<https://www.theguardian.com/money/2012/oct/22/amazon-wipes-customers-kindle-deletes-account>>



consumer interests are nevertheless taken into account, such as the possibility to access an e-book on multiple devices and to lend it to a friend or a family member (although it is as a time-limited and one-time option). The centralised system is even more controversial when it comes to the disposal of a copy for the purposes of entering a secondary market. This disadvantage, however, can be turned into an advantage for both sides if Amazon were to take an active role in enabling a secondary market.

- 36 Making it technically possible to move purchases in-between user accounts would provide consumers with an option to dispose of a copy (albeit limited to potential acquirers in possession of a Kindle user account) and also provide Amazon with a certain degree of control, particularly when it comes to enforcing the applied DRM measures. What is required to this end, is to provide a consumer (in possession of a Kindle user account) with an option to transfer his or her purchase to a different consumer (with a Kindle user account). The consequence of this would be that the content of an e-book is synchronised to the devices associated with the acquirer's account and that an e-book is delisted from the previous owner's account, resulting in synchronised content being removed from respective devices.
- 37 When facing territoriality of exhaustion, it would also be necessary to verify for each copy whether the rights are actually exhausted. Correspondingly, one needs to implement a check whether a copy was placed on a market within the EEA, and, if yes, then the transfer should be permissible. To determine which transactions took place within the EEA, the most straightforward solution would be to filter out transactions from the 6 dedicated marketplaces of the EU Member States. If this option is chosen, purchases by consumers situated in the EU but without access to any of the dedicated marketplaces within the EU, would be out of the scope of a secondary market. This should most certainly be prevented. If the exhaustion principle is to remain EEA-wide, there is a need to classify transactions not based on whether they took place on a dedicated marketplace, but to filter out purchases made by the residents of the EU Member States on all the marketplaces. This second option would also ensure that copies purchased by residents of 10 EU Member States having access to dedicated marketplaces would be eligible for entering a secondary market regardless of whether they were purchased on a dedicated marketplace or on a global one.
- 38 In regard to bulk purchases, resale depends on the answer to the question posed in a previous section; namely, who would be eligible to resell the copies. The solution would be rather similar in every case

(8.5.2017).

as was described above: either an individual Kindle account or Whispercast administrator account could enjoy the option to transfer a copy to a different account. In the event that only an administrator account is permitted to resell the purchased copies, it is possible to carry out a transfer irrespective of whether or not individual copies were already distributed across separate Kindle accounts. This is due to the fact that Whispercast - like a regular Kindle - is managed centrally and delisting a title from an account will result in removing the respective synchronised content from associated devices. However, the question whether a resale of a copy purchased through Whispercast by an individual account should be permitted remains. By analogy to the world of printed books, it should be the case. Nevertheless, this can also be seen in the context of the *UsedSoft* judgment and prohibition on splitting volume licences.<sup>63</sup>

- 39 The scenario described above is not a new one for Amazon. In 2009, the company filed an application and in 2013 was granted a patent in the US for a secondary market for digital objects.<sup>64</sup> According to the patent description, the system allows storing digital objects purchased from original vendors in a secure personalised data store and moving objects into the other user's data store subject to meeting certain (if any) conditions. These conditions can include one or more business rules, such as a move limit e.g. restricting the number of times an object can be moved between the users, levying a fee upon movement, etc. Accordingly, such a system is close to that proposed, as it ensures that a copy is accessible to one user account at the time and is managed centrally.
- 40 What is overlooked here is the territoriality of the exhausted rights. It, however, could be implemented technically by introducing extra business rules as a condition for system authorisation of a transfer. For instance, limits on transferability of a copy could be put in place by the copyright holder upon publishing an e-book. Nevertheless, such limits would have to be checked against the applicable legislation. By way of example, a copyright holder is not able to prevent transfer within the EU of a copy put into circulation with his authorisation in one of the Member States. That is to say, an authorisation system of this type needs to respect possible restrictions on the copyright holder's right to control distribution of copies, as enumerated in the law.
- 41 The option described above could be the first step in enabling a fully functional secondary market of

63 CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11. para. 86.

64 E. Ringewald, inventor; Amazon Technologies, Inc., assignee. Secondary market for digital objects. US patent 8,364,595. January 29, 2013.

e-books. It would preserve the vendor's ability to exercise a certain level of control over purchases and transfers, not least when it comes to the enforcement of DRM measures. This solution would require only limited legislative change as DRM would not have to be discarded or substantially altered. Amazon's patent in the US shows that the retailer is aware of the potential emergence of a secondary market, not only a limited one, but also a broad one, where different intangible goods originating from diverse vendors are being stored in a secure location and transferred between the accounts, as it will be elaborated in the next part.

## II. Broad Secondary Market of E-Books Including Those Purchased Through Amazon

- 42 While a limited secondary market comprises e-books purchased through Amazon and transferred between the user accounts, a broad one would include copies purchased from different vendors and available for potential purchasers regardless of whether or not they are in a possession of a user account or a particular device. For e-books purchased through Amazon to be able to enter such a secondary market, it is necessary to create conditions for export of a copy from a device or Kindle application and its transfer to a different data storage (mostly over the Internet). For this reason, a copy would have to be made unusable at the time of transfer and DRM modified or abolished to allow a transfer.
- 43 Redistribution of digital content has been studied by some scholars primarily from the technical perspective. Whereas the purpose of the DRM measures is to restrict the user's disposal of a copy and as such it conflicts with the aim of redistribution, proposals have been made on how to facilitate redistribution while preserving DRM policies.<sup>65</sup> Acknowledging the technical difficulty of securing digital content, the authors suggest focusing on the distribution of digital copies to a variety of devices instead of only custom-built compliant devices, and its subsequent controlled redistribution. This solution allows the use of watermarking for the purpose of tracing a copy; furthermore, it also allows the inclusion of a payment mechanism into a transaction, either as a direct one between the consumers, or with the involvement of a provider or even a financial institution.
- 44 If such a system, preserving DRM policies upon a

copy's transfer, is indeed implementable, it could potentially address concerns associated with enabling a broad secondary market. For instance, if DRM measures are preserved and watermarking is used to pass metadata of content and of transaction, vendors should not be concerned with users extracting copies from an associated compliant device. What remains to be studied is whether large-scale changes to the DRM policies of Amazon are necessary to allow export of the content while preserving other DRM policies. Another alternative to enable a transfer of a copy protected by DRM is to completely abolish DRM, which is clearly a more radical step. Nevertheless, certain publishers experimented with issuing e-books DRM-free and reported that they did not observe a significant increase in piracy levels and would continue to do so.<sup>66</sup>

- 45 The only aspect that was identified as a challenge of a legal, technological and organisational nature, and not directly addressed in the solution described above, is territoriality of the exhaustion principle. However, as technical implementations could potentially permit preservation of certain DRM policies and watermarking, it could facilitate passing on information regarding the initial transaction. Having this information stored securely along a copy, combined with mechanisms as described in the Amazon patent and allowing checks whether certain conditions were met to either confirm or deny a transfer, could serve the purpose of determining which copies can be transferred. However, there is also a need to decide on which basis transactions would be qualified as taking place within the EU/EEA. If for e-books distributed through Amazon it could be, as discussed earlier, transactions made on the dedicated marketplaces or those made by the EU or EEA residents, it is more challenging to define it for the wide array of e-book distribution channels.
- 46 Enabling a broad secondary market of e-books, which is the closest equivalent of a secondary market existing for printed books, is clearly more challenging than facilitating a limited one. However, relevant analysis indicates that such an option has been studied both from technical and business side. As a secondary market of e-books is non-existent at the moment, then following the second scenario of creation of a broad secondary market seems less realistic than starting with the first option of enabling a limited secondary market in a more controlled manner. Dividing the creation of a secondary market into stages would allow to explore any further challenges to a broad secondary market while preserving a certain degree of control by the

<sup>65</sup> S.K. Nair, B. C. Popescu, C. Gamage, B. Crispo, A. S. Tanenbaum. Enabling DRM-preserving Content Redistribution. Proceedings of the Seventh IEEE International Conference on E-Commerce Technology (CEC'05) 1530-1354/2005.

<sup>66</sup> One Year Later, the Results of Tor Books UK Going DRM-Free. Available at <<http://www.tor.com/2013/04/29/tor-books-uk-drm-free-one-year-later>> (8.5.2017).

vendors.

## F. Conclusion

- 47 Technological development has heavily influenced the consumer's habits and preferences. Whereas certain goods are only supplied as tangible ones, more and more intangible copies are being offered. It does not mean that they are independent from the material components, but it rather indicates that each copy does not require a separate tangible embodiment (e.g., paper, CD, etc.). Whereas this shift makes it convenient for consumers to access a work, it can also be a disadvantage because goods tend to be differentiated for a number of purposes depending on the existence of a tangible embodiment.
- 48 A rather prominent example is the exhaustion principle in copyright. There is reluctance to apply it to intangible copies. Difficulties arise due to the provisions which were adopted at the time when the distribution of intangible copies was not yet a reality. The exhaustion principle is important not only from the perspective of copyright and consumer access to a secondary market of goods, but also from the perspective of free movement of goods at the EU level. The Digital Single Market strategy aims to create a single market facilitating free movement of digital goods within the EU. The exhaustion principle was used early on by the CJEU as an instrument of removing barriers to trade in tangible goods. It is thus important to consider using it as an instrument of creating the Digital Single Market too.
- 49 This paper considers the exhaustion doctrine as an instrument of facilitating the Digital Single Market of e-books disseminated through Amazon and a secondary market thereof. The main challenges to the market posed by the exhaustion principle in its current wording are: the concepts of a copy; application of DRM measures; and territoriality of exhaustion. It is apparent that the application of the exhaustion principle to intangible copies will not itself result in a functioning secondary market because of the distinct ways of disseminating intangible goods. Accordingly, technological and organisational challenges to creating a digital single and secondary market must be considered.
- 50 Based on the analysis of challenges, two scenarios were identified. The first one implies facilitating a limited secondary market of e-books distributed through Amazon, where subsequent transfers, just as the initial one, are centrally managed. It provides a greater control for the copyright holder and vendor - in this case Amazon. Since 2013 Amazon holds a patent in the US covering such a system. This solution requires implementation of technological and organisational changes on the vendor's part and maintenance of a centralised system. It would not facilitate transactions involving copies purchased outside the centralised system. Subsequently, such a secondary market would be narrower in scope than a respective secondary market of printed books.
- 51 The second scenario - a clearly more advanced and challenging one - is to enable consumers to dispose of a copy of a purchased e-book by extracting it from a trusted Kindle device or Kindle reading application and exporting it with either preserving or discarding the applied DRM policies. There could be different ways to achieve this and researchers in the computer science field have already worked out certain options. For instance, there is a model proposed which allows transfer of intangible copies while preserving the applied DRM policies. This is in line with both the consumer's and copyright holder's expectations.
- 52 The first identified scenario of a limited secondary market could become a starting point to facilitate a broad secondary market. As it requires less effort on the vendor's side and allows vendors and copyright holders to retain almost the same level of control as with an initial purchase, it should be largely acceptable. Moreover, this option would allow the preservation of all the DRM policies applied to a copy. As the second step, a system allowing large-scale transfers of digital copies subject to particular conditions, as described in the broad secondary market option, could be developed. Only when such a system is in place, it becomes possible to arrive at a secondary market of e-books similar to the printed books.
- 53 In order to overcome the legal challenges, political decisions are required. The absence of a clear and distinctive meaning of certain concepts under EU law makes it difficult to effectively address the identified obstacles to a secondary market of intangible goods. Although the CJEU case law is of crucial importance, the fragmentation of applicable EU copyright legislation leads to differences in the national law. This results in barriers to the free movement of intangible goods.
- 54 While implementing the Digital Single Market strategy, the European Commission should consider the exhaustion principle as an instrument to leverage the Digital Single Market and a secondary market for intangible goods as its integral part. The scenarios developed in this paper indicate that different approaches can be taken. It should be possible to achieve a secondary market of e-books in a controlled manner by providing wider access to copyright-protected works while preserving the interests of copyright holders enforcing DRM technologies.