

UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?

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Abstract: Since the UsedSoft ruling of the CJEU in 2012, there has been the distinct feeling that – like the big bang – UsedSoft signals the start of a new beginning. As we enter this brave new world, the Copyright Directive will be read anew: misalignments in the treatment of physical and digital content will be resolved; accessibility and affordability for consumers will be heightened; and lock-in will be reduced as e-exhaustion takes hold. With UsedSoft as a precedent, the Court can do nothing but keep expanding its own ruling. For big bang theorists, it is only a matter of time until the digital first sale meteor strikes non-software downloads also. This paper looks at whether the UsedSoft ruling could indeed be the beginning of a wider doctrine of e-exhaustion, or if it is simply a one-shot comet restrained by provisions of the Computer Program Directive on which it was based. Fighting the latter corner, we have the strict word of the law; in the UsedSoft ruling, the Court

appears to willingly bypass the international legal framework of the WCT. As far as expansion goes, the Copyright Directive was conceived specifically to implement the WCT, thus the legislative intent is clear. The Court would not, surely, invoke its modicum of creativity there also.... With perhaps undue haste in a digital market of many unknowns, it seems this might well be the case. Provoking the big bang theory of e-exhaustion, the UsedSoft ruling can be read as distinctly purposive, but rather than having copyright norms in mind, the standard for the Court is the same free movement rules that underpin the exhaustion doctrine in the physical world. With an endowed sense of principled equivalence, the Court clearly wishes the tangible and intangible rules to be aligned. Against the backdrop of the European internal market, perhaps few legislative instruments would staunchly stand in its way. With firm objectives in mind, the UsedSoft ruling could be a rather disruptive meteor indeed.

Keywords: *UsedSoft*, CJEU, Exhaustion, WCT, Copyright Directive, ReDigi

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Recommended citation: Emma Linklater, *UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?*, 5 (2014) JIPITEC 12, para 1

A. Introduction

1 When faced with an appeal on a point of law by *UsedSoft* against a regional court order to the effect that *UsedSoft* cease marketing of ‘used’ software licences for Oracle products, the German Bundesgerichtshof referred three questions to the CJEU.¹ The questions referred concerned the meaning of the term ‘lawful acquirer’ as was contained in Article 5(1) of the Computer Program Directive (CPD).² (Question 1), whether the distribution right is exhausted within the meaning of Article 4(2) of the CPD when the first acquirer downloads a copy of the program from the

Internet (Question 2), and, if the distribution right is exhausted and the first acquirer deletes his copy, whether a second acquirer of the now ‘used’ licence can become a ‘lawful acquirer’, again within the meaning of Article 5(1) CPD (Question 3).

2 To the second question – agreeing with the Advocate General – the CJEU answered in the affirmative: The distribution right could indeed be exhausted, so long as the transaction was one of a ‘sale’. In response to the first and third questions, contradicting the AG, it found that a second acquirer could become a lawful acquirer, and thus did not need authorisation

from the rightholder to make a reproduction copy necessary for use. The result was nothing short of a revelation: Contractual licences could be sales and thus subject to exhaustion – a principle which until this point had applied only to physical goods – and resale was permissible without authorisation even where a reproduction took place. The significance of the ruling became even more evident when, just short of one year later, a US District Court decided the direct opposite on a notably similar issue.³

- 3 This paper sets out to examine the impact that the *UsedSoft* decision could have on the development of a doctrine of e-exhaustion within the EU. Part B looks into the provisions of the CPD and how these were applied by the Court. Part C then holds the ruling against the international law framework established principally by the WIPO Copyright Treaty 1996 (WCT),⁴ with a view to determining whether there is any solid international legal basis for such a doctrine of e-exhaustion to develop. Finding that there is not, it then looks at the provisions of the European Copyright Directive (EUCD).⁵ These too would seem to ‘block’ any digital exhaustion applying to non-software content, and thus it seems that if the Court wishes to press the issue, it is going to have to go beyond the written law at both the EU and international levels. With this in mind, section D considers how the CJEU got to its decision in *UsedSoft* in the first place. It appears that this was done through a combined application of internal market principles and a willingness to look at the digital environment as functionally equivalent to the physical one. With the unpredictability of purposive reasoning in mind and equal treatment as an underlying principle, the article concludes that the expansion of the *UsedSoft* ruling, even though implausible from a technical legal perspective, may be much closer than the content industries might care to imagine.

B. Putting *UsedSoft* in context

- 4 Before looking at the *UsedSoft* decision itself, it is useful to highlight the structure of the CPD, particularly insofar as it relates to reproduction and distribution. It is due to the structure of the CPD on these matters that the Court could come to the findings that it did, and, as will be examined in part C.III, it is worthy of note that this specific construction is not replicated in the more general EUCD.

I. The Computer Programs Directive

- 5 In the CPD, the reproduction right is granted by way of Article 4(1)(a). It provides that any “permanent or temporary reproduction of a computer program by

any means and in any form, in part or in whole” can only be undertaken with the authorisation of the rightholder. The distribution right is to be found in Article 4(1)(c), which gives the author the right to control “any form of distribution to the public, including the rental, of the original computer program or of copies thereof.”

- 6 The principle of exhaustion is also codified in the Directive, and appears in Article 4(2):

The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

- 7 There are two key elements to this provision. First, there is the term ‘first sale’. According to Oracle, what was occurring when a consumer downloaded its software and concluded a user licence was not a sale, but a licence. As such, if exhaustion was to apply at all, the Court would have to find a way of viewing the contractual licence concluded between the parties as a ‘first sale’. Second, we must consider the wording ‘that copy’. In the physical world, where a rightholder authorises the distribution of a particular copy in the EU, his or her right of further distribution is said to be ‘exhausted’ and the purchaser is free to resell it to whomever he chooses, with no obligation to the rightholder.⁶ The exhaustion doctrine, however, as envisaged and developed by the EU Courts, had up until the *UsedSoft* ruling been applied only to physical copies of a work, where it is only ever ‘that copy’ under consideration. The digital context brings difficulties for this wording as it is not the original copy being passed along, but a new one.
- 8 A final provision, which is specific to the CPD but was critical for the CJEU’s ruling, is a qualification for the exclusive right of reproduction. Article 5(1) provides that:

In the absence of specific contractual provisions, the acts referred to in points (a) and (b) [the right of translation, adaptation, arrangement or alteration] of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

II. The factual background to *UsedSoft*

- 9 The transaction at issue was labelled by Oracle as a ‘licence’, incurring no transfer of ownership. Rather than the user having to access the program via a physical CD-ROM loaded onto a computer, any consumer could, via the Oracle website, download

a copy of the software free of charge.⁷ However, the download can only be made useable where a user agreement has been concluded with Oracle. This agreement gives a “non-exclusive and non-transferrable user right for an unlimited period for that program”.⁸

- 10 The technicalities of the contested ‘resale’ were such that, when the first acquirer chooses to resell the software via UsedSoft, he is only reselling the *user agreement* and not the copy of the software which he downloaded from the Oracle website. Thus, the second acquirer would actually only have the user agreement transferred via UsedSoft, and would take it upon himself or herself to download the software from the Oracle site. To use the software, the second acquirer would require both the ‘second-hand’ licence and the newly downloaded copy of the software; no reproduction of the software necessarily takes place in the process. Nonetheless, as we will see, the Court considered that the reproduction right did risk being infringed.

III. The UsedSoft ruling

- 11 Dealing with Question 2 first, the CJEU addressed the question of whether the transaction at issue was a “first sale or other transfer of ownership” which can be subject to the distribution right. If the transaction could not be categorised as such, no exhaustion could take place.
- 12 To interpret the meaning of ‘first sale’, the Court drew upon a “commonly accepted definition” of a sale, which necessarily involves a transfer of ownership, be it in the form of a tangible or intangible item.⁹ At the core of the categorisation of what looked like a licence that was in fact a ‘sale’ was the perpetuity of the right of use, which was not limited in time.¹⁰ By the fact that the right of use granted was perpetual in nature and “designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor”,¹¹ the Court felt warranted to conclude that the contract at hand was one of sale rather than a licence. The result of this was that the transaction could be categorised as one of distribution, with the consequence that – since a ‘first sale’ had taken place – exhaustion could plausibly come into play.
- 13 However, at this point the transferral of the exhaustion doctrine, as codified by Article 4(2) of the CPD, from the tangible world to the intangible one becomes slippery. For e-exhaustion to be possible, the Court must consider the novel interaction between the distribution and reproduction rights, an interaction that was not at issue in the world of physical goods where it was simply *that same copy* being passed to a new owner. This intangible-only connection between the reproduction right and the distribution right is reminiscent of a ‘hen-and-egg’ type situation:¹² the two rights, which previously held separate existences, are now forced to interact.¹³ The Court found that the purpose of Oracle allowing free downloads, exploitable only upon conclusion of a user licence, was to make the copy useable by the consumer: The agreement and the download form a whole since both parts are necessary for use.¹⁴ As noted above, the resale in UsedSoft was in reality of the licence alone (there was no passing along of the first acquirer’s copy of the software); however, the CJEU created a link in finding that the agreement and the download were indivisible and must be “examined as a whole for the purposes of their legal classification”.¹⁵ As such, the Court in *UsedSoft* considered that the reproduction right was indeed at issue.¹⁶ It is interesting to note, however, that this set-up is quite uncommon for the distribution of copyrighted content other than software; for e-books, music and film, for example, the conclusion of the user agreement and the downloading of the content take place almost instantaneously, one leading to the other.¹⁷ In these situations, the reproduction right more clearly comes into play, since a second copy must be created on the new ‘owner’s’ hardware.
- 14 The true ingenuity of the Court’s initial finding that a download could be a ‘sale’ comes in its application of this to the provisions of the CPD. As a distribution, there is a right that can be exhausted; when exhausted, any subsequent acquirer becomes a ‘lawful acquirer’ within the meaning of Article 5(1). That second acquirer can then, as provided by Article 4(1)(a), make any reproduction ‘necessary for use’ without the authorisation of the rightholder. However, this finding was not unconditional. Underpinning the expansion of the doctrine was the notion that the tangible and intangible worlds should be treated as functionally, but not formally, equivalent.¹⁸ As such, it is only if the original acquirer “make[s] the copy downloaded onto his computer unusable at the time of its resale” that he can “avoid infringing the rightholder’s exclusive right of reproduction”. In essence, the Court adapted the tangible rule to take into account the qualitative difference between tangible and intangible content that comes with the ease of reproduction, but did so in such a way that the same outcome (creation of an aftermarket¹⁹) could be achieved.
- 15 With the details of the decision now clear, we can look to how this formulation holds up against the broader legislative landscape. Indeed, despite this new forced interaction between the distribution and reproduction rights, the next section shows that they are still nonetheless two separate rights under the legislative framework established by the WCT. Further, the WCT sets out another right – the

right to make works available for digital interactive transmission – which was wholly neglected by the Court in *UsedSoft*. These formalistic points alongside the lack of replication in the EUCD of the provisions of Articles 5(1) and 4(1)(a) which allowed the conclusions above would seem to render the *UsedSoft* decision something of a one-shot comet.

C. UsedSoft as a one-shot comet

16 It is not the purpose of this article to chronicle the multifaceted interactions between the international and European copyright frameworks, but it is useful – for the purposes of demonstrating how oddly *UsedSoft* sits in the broader landscape – to briefly highlight the main points of contention. This section therefore looks at the WIPO Copyright Treaty, its provisions and the relationship it has with the CPD.

I. The missing ‘making available’ right

17 Known as the ‘Internet treaties’, the WCT and the WIPO Performances and Phonograms Treaty were adopted by the Member States of WIPO in 1996.²⁰ As well as providing for distribution and communication rights,²¹ the WCT covers situations of “digital interactive transmission²²” through the introduction of a new exclusive right for authors covering the “making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”.²³

18 In *UsedSoft*, it seems clear that Oracle’s right to ‘make available’ its software was at issue when *UsedSoft* “promoted an ‘Oracle Special Offer’ in which it offered for sale [via the Internet] ‘already used’ licences for the Oracle programs”.²⁴ This would appear to be all the more so given the Court’s willingness to see the download and the licences as “indivisibly linked”.²⁵ It seems rather strange then that in *UsedSoft* the Court made no reference to this new WCT-based right in its ruling.²⁶ Why might this be the case?

19 A clue in this respect is that the ‘making available’ right does not appear in the text of the CPD itself. A possible explanation for this omission could lie in timing; although the CJEU cites the current CPD, Directive 2009/24/EC, the substantive provisions of this Directive were actually adopted in 1991, prior to the WCT.²⁷ Directive 2009/24/EC is in fact a “straightforward codification”²⁸ of consolidated amendments to the original Directive. Nonetheless, the failure to incorporate these rights into the 2009 Directive can and should be read as a severe defect on the part of the drafters.²⁹ In fact, the Commission’s Report to the Council, the EP and the Economic and

Social Committee on the implementation of the CPD dated 2000³⁰ does make reference to the WCT. The Commission’s Report states that:

*Whilst Article 4 (c) is capable of such a wide interpretation [so as not to be “limited to the distribution of tangible copies of a computer program on floppy disks”], the author’s exclusive right of authorising any making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them (cf. Article 8 WCT) is currently not provided for. Under these circumstances the need for the Community to ensure compliance with WCT requirements by providing for complementary rules on making available of computer programs is being taken into account in the proposal for a Directive on copyright and related rights in the Information Society.*³¹

20 This can be used to criticise the argument used by the CJEU that the CPD is ‘lex specialis’. The CPD simply does not provide authors with an exclusive right to make their works available which, due to the hierarchical nature of international treaties, it should. Article 216(2) of the TFEU provides that such “agreements concluded by the Union are binding upon the institutions of the Union and on its Member States” and, as a matter of international law, Article 26 of the Vienna Convention on the Law of Treaties provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. As such, from the moment the WCT was concluded, the EU came under an international law – and EU Treaty – obligation to implement it and ensure compliance with its provisions.³² This obviously leads the ruling to come under some fire, and the above quote could give force to an argument that the CPD being defective in this respect should have been read in light of the EUCD. This is all the more so upon a reading of Article 1(2)(a) of the EUCD, which provides that “this Directive shall leave intact and shall in no way affect existing Community provisions relating to the legal protection of computer programs”. In the view of the present author, had the Court relied on the EUCD to invoke the ‘making available’ right and for interpretative guidance in this respect, it could still have left the provisions on computer programs intact and caused no disruption the relationship between the two Directives.

21 Knowing that the ‘making available’ right is implemented in the EUCD, this should provide an extra layer to shield the expansion of e-exhaustion to other digital content: Only the distribution right is exhaustible, not the making available or reproduction rights. Would the Court really push the boundaries so far as to overlook this right specifically envisaged to provide authors with the ability to authorize every act of making available on the Internet for digital interactive transmission?

II. Recital 29 of the EUCD as blocking exhaustion of intangibles

22 In addition, the very categorisation of the making available right in the EUCD is relevant and could also be used to keep big bang theorists at bay. The ‘making available’ right described above was envisaged as a “neutral, legal-characterization-free description of interactive transmissions”.³³ It leaves contracting states with relative freedom as to how they categorise it, which can be under the communication right or the distribution right.³⁴ Since the CPD makes no mention of a ‘making available’ right, it could be something of a guessing game to ascertain which way the European legislator would have gone in this respect.³⁵ However, taking advantage of the ‘umbrella solution’ offered by the WCT, we can see in the preparatory documents leading up to the EUCD that legislative intent was to characterise ‘making available’ under the communication right, in which case the question of distribution of ‘digital interactive transmissions’ – even if these were in the form of downloads – would not arise.³⁶ However, for big bang theorists wishing to advocate in favour of a making-available-as-distribution-thus-exhaustible approach, this point could be contested on the basis of the initial 1995 Green Paper, which seemed to indicate categorisation as closer to distribution, perhaps as a form of rental,³⁷ while the post-WCT proposal seems to have had primarily non-copy-related uses in mind rather than the type of situations entailing downloads to be stored and accessed by the user.

23 From the Commission’s report on the implementation of the CPD cited above and recital 29 to the EUCD, however, we can discount any legislative intent for exhaustion to apply to the resale of intangibles without a material medium. Speaking of the 1991 CPD, the Commission states that:

*As to the exhaustion of copyright it must be borne in mind that under the Directive Community exhaustion only applies to the sale of copies i.e. goods, whereas supply through on-line services does not entail exhaustion.*³⁸

24 The issue as to possible exhaustion of intangibles also appears to be clarified by Recital 29, which provides that:

The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder.

25 Rather than a simple statement reiterating that the communication right cannot be exhausted as is the view of some authors, to the present author, the second sentence was not in fact required by the WCT and represents an active choice on the part of

the EU legislator to restrain the distribution right from applying to *any* intangible. To understand this notion requires some additional information about the WCT: Article 6 on the right of distribution provides that:

- (1) *Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.*
- (2) *Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*

26 The AS qualifies that “the expressions ‘copies’ and ‘original and copies,’ being subject to the right of distribution [...] refer exclusively to fixed copies that can be put into circulation as tangible objects”.

27 AS 6 can, however, be read as allowing for the exhaustion of intangibles where contracting states have chosen these to be characterised as ‘distributions’ under the umbrella solution and if they view such transactions as a “first sale or other transfer of ownership”.³⁹ This is on the basis that the provision of a distribution right over tangible goods is the minimum level of protection set out by the Treaty. States can choose to go beyond this and apply the distribution right to intangibles such as downloads. However, even then the scope of exhaustion is still narrowly set and likely to be of little commercial significance: it still only covers *that (downloaded) copy*. This would only enable, for example, a user who stored a music download on his or her iPod to sell the iPod along with the content, since no further invocation of the making available or exhaustion rights takes place.⁴⁰ The second sentence of recital 29 can be read as indicative that the legislator did not intend to go beyond the minimum provision of a distribution right over tangible goods and did not wish this to extend to intangibles also. As such, this reading of the EUCD, and with the Report of the Commission on the implementation of the CPD in mind, it seems that the Court in *UsedSoft* was going beyond what was intended by the legislator.

III. The specific provisions of the CPD

28 A final point to the effect that *UsedSoft* cannot be expanded beyond the CPD can be made on point of legal construction: If the *UsedSoft* decision was decided under the EUCD, the Court’s modicum of creativity in overcoming the reproduction copy hurdle could not have been conceived because – private copying aside⁴¹ – there is no allowance for a ‘lawful acquirer’ to create a reproduction copy without the authorisation of the rightholder.

29 Already, we have seen this point arise in a regional court decision stemming from Bielefeld, Germany, where it was found that the cross-application of the CPD reasoning to the EUCD context was not possible.⁴² Therein, the Bielefeld Court paid particular attention to the difference between the EUCD and the CPD in the way that they treat reproduction copies. In the view of the present author, this distinction is warranted given that the CJEU in *UsedSoft* at no point strayed from a ruling on the CPD alone in its consideration of questions 1 and 3. The CPD – but *not* the EUCD – provides a ‘get around’ for the reproduction copy in the form of Article 5(1). Thus under the CPD alone *could* the CJEU find that if the reproduction was necessary for use, then a second acquirer could be a lawful acquirer. Were the EUCD to contain a provision similar to Article 4(1)(a) CPD, the possibility for a broader e-exhaustion doctrine to be read into the ruling could be feasible. But the reality is that, without this reproduction get around, the *UsedSoft* ruling is more likely to be contained to future rulings on the CPD alone.

D. UsedSoft as the big bang for e-exhaustion

- 30 The above points have attempted to counter big bang theorists’ arguments that *UsedSoft* is the beginning of a new era for e-exhaustion. By setting out the complex legal framework with which the question of digital exhaustion should interact, we can already see that the simplicity in any arguments towards cross-fertilisation from the CPD to the more general EUCD, or elsewhere, is *a priori* unwarranted. However, we already by now clearly have the feeling that the Court is willing to go beyond the strict word of the law – be it international or European – and introduce reasoning so as to reach outcomes it sees as just and warranted.
- 31 This part will explore two features of the ruling which go some way to explaining why the Court weighed its outcome in *UsedSoft* as apt for the digital age. First, it considers the purpose the Court was aiming to achieve: the preservation of the exhaustion doctrine. As an aim unto itself, this is to be regarded in the broader context of the free movement rules. Second, it considers that the Court achieves its goals in a particular way: by equating the digital, online world, to the physical one, regardless of whether different legal structures exist for each. It does so by calling upon the principle of equal treatment, and as such widens the ambit of the ruling away from specific legislative provisions to much broader concepts of EU law. Lastly, the ruling is briefly contrasted with the very different approach to resale of digital downloads in the US *ReDigi* decision.
- 32 This section shows that with two overarching aims in mind – equal treatment (equivalence) and free movement – the *UsedSoft* ruling, even noting that it falls short of international copyright obligations set out by the WCT, could be a rather dangerous meteor indeed.

I. A ruling with firm internal market aims

- 33 The *UsedSoft* ruling has been described as being “firmly purposive”⁴³ in nature. However, to describe it as such we must first consider what norms the Court was attempting to preserve. From the above, it seems clear that the legislator was not seeking simply to preserve the copyright framework as set out in the WCT. If the intent of the legislator behind the Directives at hand was to implement – or at least not neglect – the WCT, then a purposive construction would seem unfitting. What then did the Court have in mind?
- 34 One clue to the Court’s doggedness in the ruling points stems from the motive of protecting the very principle of exhaustion itself. This is apparent from the key paragraph 49, whereby the Court senses that any alternative ruling would “divest [the rule of exhaustion] of all scope”.⁴⁴ The nature of the exhaustion rule that the Court wishes to preserve is, however, what the Court itself wants to make of it. While it has been argued that exhaustion is an act of balance, thus making its aim to place a limit on the significant rights bestowed upon intellectual property owners under national law, in the EU context, the “promulgation of an overarching European exhaustion principle has been, if at all, a response to the dynamics of shaping a single market rather than an attempt to approximate intellectual property laws”.⁴⁵
- 35 Thus, beyond preservation of the purpose of exhaustion as an objective unto itself, we should read the underlying aim as to “avoid partitioning of markets” and “to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned”.⁴⁶ In order to protect these internal market aims, the Court engaged in reasoning based in a sense of ‘equivalence’;⁴⁷ essentially it asked why online and offline markets should be treated differently if downloading is the “functional equivalent of the supply of a material medium”⁴⁸ and “from an economic point of view [they] are similar”.⁴⁹

II. Applying the norms through the notion of tangible-intangible equivalence

36 A sense of ‘equivalence’ is to be found throughout the ruling.⁵⁰ To the Court, it “makes no difference” whether the software is made available through a download or a CD-ROM or DVD.⁵¹ The permanency of the use, which is granted “for an unlimited period in return for payment of a fee”, leads the Court to determine that both downloads and physical sales constitute “transfer of the right of ownership of that copy”.⁵² This sense is also clear when, in response to Oracle’s submission that policing the deletion is difficult, the Court responds by saying that in a like situation with a physical medium – a CD-ROM or DVD – the ability to control reproductions is equally hard but “it is permissible for the distributor – whether ‘classic’ or ‘digital’ – to make use of technical protective measures such as product keys”.⁵³ While the Court is firm in its conviction that downloads are functional equivalents for consumers, it does perhaps simplify the matter.⁵⁴

37 Paragraph 61 reads:

It should be added that, from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar. The on-line transmission method is the functional equivalent of the supply of a material medium. Interpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment confirms that the exhaustion of the distribution right under that provision takes effect after the first sale in the European Union of a copy of a computer program by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of the program.

38 If we simply replace the reference to computer programs with ‘e-book’ or ‘downloaded music file’ then we get the distinct feeling that the implications of *UsedSoft* could be much broader than it first appears. Looking at the second sentence of this paragraph, the Court’s reference to equal treatment as a justification for treating tangibles and intangibles alike could have wide repercussions.

39 As a general principle, equal treatment means that “comparable situations must not be treated differently, and different situations must not be treated in the same way unless such treatment is objectively justified”.⁵⁵ In the field of economic law, this principle is applied to avoid distortions of competition for the purposes of completing the internal market, and so recourse to equal treatment is in keeping with the objectives set out in the above section.⁵⁶ However, presenting intangible downloads as the ‘functional equivalent’ of physical sales implies that the two are comparable so as to warrant the application of the principle of equal

treatment. This could be taken already from the ruling insofar as the Court concludes that a ‘sale’ is taking place; however, the second sentence of this paragraph is particularly menacing if it could be taken to mean that based solely on the substitutive capacity of online transmissions for the supply on a material medium, the principle of equal treatment necessitates that the exhaustion doctrine also encompasses e-exhaustion.

40 Under this reading of paragraph 61, the implications are much wider, but strangely for a statement based on general principles the Court does not consider any objective justifications for a difference in treatment. The reason for this omission could lie in the nature of the call to general principles itself – the Court inserts paragraph 61 after it has already established that, on the basis of the objectives of the CPD (or, somewhat less convincingly, on the lack of evidence of any legislative intent to differentiate), the computer programs on any medium should be subject to the same treatment.⁵⁷ Tridimas notes that where equality is a ground for review of Community measures (here the CPD), “the application of the principle is qualified by the discretion of the Community legislature and the Court focuses more on the objectives of the measure at issue”; the Court already noted that the CPD was not intended to differentiate and so it did not need to investigate further.

41 Although its statement reasons towards across-the-board equivalence of intangibles and tangibles on the basis of the general principle of equal treatment, developments along these lines should be approached with caution. The situation of e-books is a case in point, with rumours abounding that the Netherlands Public Library Association (VOB) has started a test case against *Stichting Leenrecht* (the Dutch public lending right collecting agency), in which it has asked the Regional Court of the Hague to refer questions to the CJEU on whether libraries have a legal right to e-lending based on an ‘electronic interpretation’ of the Rental and Lending Right Directive 2006,⁵⁸ as justified by the *UsedSoft* decision.⁵⁹ This case would be of particular interest since the same doubts as to the legislative intent behind e-exhaustion arise in the rental context as in the CD, as expressed above. With this (potential) case in mind, it still remains to be discerned whether e-books and books are comparable, although it can be noted that for the CJEU at least the potential of substitutability has been accepted as sufficient support for a finding of comparability.⁶⁰ A bigger stumbling block could lie in any objective justifications that can be argued for a difference in treatment. Here, most certainly, the lack of reliability of the ‘original acquirer deletes’ method proposed by the Court would seem to justify that across-the-board e-exhaustion is not justified unless a greater means is provided for rightholders to protect themselves against the nemesis ‘additional copy’.

III. Comparison with the US ReDigi Decision

- 42 If the reasoning of the Court in *UsedSoft* is to be understood as being firmly rooted in free movement aims – with the reference to the principle of equal treatment also being motivated by competition within the market – then this can provide an inroad to understanding how and why the US District Court in *ReDigi*, when faced with a largely similar issue,⁶¹ came to the opposite outcome.
- 43 In *ReDigi*, the Court held that “the unauthorised transfer of a digital music file over the internet – where only one file exists before and after the transfer – constitutes a reproduction.”⁶² It asserted that it is “the creation of a new material object, and not the creation of an *additional* material object, that defines this right.”⁶³ This is in stark contrast to CJEU’s unwillingness to deny “effective use” because the user would be blocked by the inability to make a reproduction copy without authorisation.⁶⁴ In this respect, the Advocate General’s Opinion in *UsedSoft* is in fact much closer to the US decision, both of which regard the reproduction right as blocking the creation of new copies without authorisation, rather than simply barring additional copies from being brought into circulation as the CJEU did.⁶⁵
- 44 When considered in light of the underlying norms, it seems that the legal blockages to e-exhaustion (from the EU legislator or the WCT) can in reality cause but a little stir in the wider vision of the European Court: “[C]opyright must justify itself and fit in with the free movement rules.”⁶⁶ It is for this reason that we see such a major contrast appearing between the CJEU’s ruling and the *ReDigi* decision in the US. The latter can be seen as firmly rooted in copyright; not the US Copyright Act alone, but also the Copyright Clause in the Constitution which grants Congress the express power to enact copyright laws “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶⁷ An interpretation of the first sale doctrine to alter the wording of ‘that copy’ and implicate the reproduction right also would imply a reading beyond the express word of the written law. While the US Court seemed to consider there may be some *need* for exhaustion to apply to certain digital situations, it did not feel it was appropriate to take such a decision and instead deferred to Congress to decide if physical limitations on the first sale doctrine were indeed ‘outmoded’.⁶⁸
- 45 It is therefore due to the “fundamentally different logic”⁶⁹ behind the EU approach as compared to the US one that e-exhaustion could be placed firmly on the table. Despite the legal surrounds, particularly as far as the EUCD would appear to expressly prohibit digital resale, this purposive interpretation of the exhaustion doctrine as an enabler of free movement, regardless of whether that free movement concerns physical objects or digital downloads, could be the carrot-like norm leading the (exhausted) digital donkey onwards.

E. Conclusion

- 46 This article has sought to address the question of whether the *UsedSoft* ruling is a one-shot comet or whether it could be expanded with a big bang effect for the exhaustion of downloads of content other than software. Looking at the word of the WCT alone and reading the CPD and EUCD in such a way as to implement this Treaty, it is clear that the *UsedSoft* ruling does not line up in a number of respects. To the present author, it seems unlikely that the making available right can remain ‘missing in action’ when we transfer to the EUCD, which is after all the Directive that concerns the majority of digital content and seems all the more relevant after the *Nintendo* ruling of January 2014.⁷⁰ Further, there appears to be specific legislative intent *not* to allow e-exhaustion under the EUCD and a lack of foundation therein under which the reproduction ‘trick’ the Court pulled off using Article 5(2) of the CPD could be repeated.
- 47 Nonetheless, although the strict word of the law does not support any extension of *UsedSoft*, the ruling itself shows that the Court seems to have another – much bigger – plan up its sleeve. Batchelor sees in *UsedSoft* “a court determined to make the free movement and exhaustion principles of the off-line world... [apply] to a digital world”,⁷¹ but one whose “commitment to ideology” could be seen as coming “at the expense of legal certainty”. This sentiment is also held by the present author: With more overarching principles in mind, which undoubtedly go beyond the copyright framework alone, it is conceivable that the impact of the ruling could indeed be much broader than software, despite first appearances.

- 1 Case C-128/11 *Usedsoft Gmbh v. Oracle International Corp.* [2012] ECR I- 0000.
- 2 Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (‘CPD’) OJ L 111, 05.05.2009, pp. 16–22.
- 3 *Capitol Records, LLC v. ReDigi Inc. (‘ReDigi’)*, 1:12-cv-00095, No. 109 Southern District of New York, 30 March 2013.
- 4 WIPO Copyright Treaty of 20 December 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997). The WIPO Copyright Treaty was ratified on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000, OJ L 89, 11.04.2000, pp. 6–9.
- 5 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, 22.06.2001, pp. 10–19.

- 6 This is known as the ‘doctrine of Community exhaustion’ and first appeared in the jurisprudence of the Court in the early 1970s in the context of free movement and limitations on parallel trade; see Case 78/70 Deutsche Grammophon Gesellschaft Mbh v Metro-Sb-Großmärkte GmbH & Co. KG, [1971] ECR 487.
- 7 Ibid.
- 8 UsedSoft at para. 43 (argument of Oracle).
- 9 Ibid., at para. 42.
- 10 Ibid., at para. 47. Although this paper focuses on the legal blockages to the development of a broader e-exhaustion doctrine, this point has caused some authors to comment that software developers can easily circumvent the ruling by providing only time limited access. See, for example, Batchelor, B. and Keohane, D. (2012), ‘Usedsoft - Where to Now for Software Vendors?’, 33 European Competition Law Review 12, pp. 545-551; Stothers, C. (2012), ‘When Is Copyright Exhausted by a Software Licence?: Usedsoft v. Oracle’, 34 European Intellectual Property Review 11, pp. 787-791 Torremans is in contrast not overly convinced by this; see Torremans, P. (2013), ‘The Future Implications of the Usedsoft Decision’, ALAI Conference on Dissemination and Management of Works of Authorship on the Internet in Cartagena, September 2013, available at <http://www.alaicartagena2013.com/index.php/congress/papers> (last accessed 08.10.13).
- 11 The “absolute right to exclude others from using the intellectual property [...] and not just a right to ‘reasonable’ royalties” (Stothers (2012)) underpins copyright as we know it and as such this statement appears provocative insofar as it would indicate that the rightholder is only entitled to limited, appropriate remuneration. However, according to Stothers, this part of the ruling should be read as the Court simply meaning that remuneration should not “go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned”. See UsedSoft at para. 62-63 and Stothers, C. (2012), at p. 790.
- 12 See the slides of Ficsor, M. (2013), ‘Slides: Relevance of Exhaustion of Rights in the Digital Environment’, ALAI Conference on Dissemination and Management of Works of Authorship on the Internet, in Cartagena, September 2013, available at <http://www.alaicartagena2013.com/index.php/congress/papers> (last accessed 08.10.13).
- 13 As is detailed in Part C, the WCT does not block the resale of a download on the medium on which it is stored.
- 14 Ibid., at para. 44.
- 15 UsedSoft at para. 44.
- 16 This is clear from the conditions for resale at paras. 70 and 78 where the Court talks of avoiding infringing the exclusive right of reproduction.
- 17 This is the ‘*ReDigi*’ scenario, examined in Section D.III.
- 18 As detailed in Part D.II.
- 19 On the considerable economic rationales behind the exhaustion doctrine, see Puig, A.R. (2013), ‘Copyright Exhaustion Rationale and Used Software: A Law and Economics Approach to Oracle v. Usedsoft’, 4 Journal of Intellectual Property, Information Technology and E-Commerce Law 3, pp. 159-178.
- 20 These were the first Treaties in the area of copyright to which the EU (then EC) acceded in its own right, using the procedure laid out in what is now Art. 218 of the TFEU (then Art. 200 TEC). Given that the substance of copyright law is a shared competence between the EU Member States and the EU itself, both Treaties were equally signed by all Member States. See Von Lewinski, S. and Reinbothe, J. (2002), ‘The WIPO Treaties 1996: Ready to Come into Force’, 24 European Intellectual Property Review 4, pp. 199-208
- 21 Arts. 6 and 8 WCT respectively.
- 22 Ficsor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (Oxford; New York: Oxford University Press 2002) at p. 203.
- 23 Art. 8 WCT.
- 24 UsedSoft at para.25. On fitting this type of posting on the Internet/download situation ‘squarely’ into the ‘making available’ right, see Ginsburg, J.C. (2004), ‘The (New?) Right of Making Available to the Public’, in W. R. Vaver D. Bently Lionel Cornish (ed.), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge, UK: Cambridge University Press 2004), pp. 234-247 at p. 238-241.
- 25 UsedSoft at para.84.
- 26 Moon, K. (2013), ‘Resale of Digital Content: Usedsoft v. *ReDigi*’, 24 Entertainment Law Review 6, pp. 193-195 For a detailed overview of the WCT framework and the compliance of UsedSoft and the US rulings in *Kirtsaeng* and *ReDigi* with this, see Ficsor, M. (2013). In *ReDigi*, the US Court does mention the making available right, although it finds that “[i]n any event, because the Court concludes that actual sales on *ReDigi*’s website infringed Capitol’s distribution right, it does not reach this additional theory of liability” (*ReDigi* at p.8). In the context of the EUCD, the CJEU has determined that the separate rights of communication to the public and making available “belong to the author”; see for example C-277/10 *Martin Luksan v. Petrus van der Let*, [2012] ECR I-00000, para. 86.
- 27 Council Directive 91/250/EEC on the legal protection of computer programs OJ L 122 , 17/05/1991, pp.42-46. The 2009 CPD codification was enacted under an expedited procedure on the basis of Inter-institutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C 102, 04.04.1996, pp.2-3; see point 4 of the Commission Proposal for a Directive of the European Parliament and of the Council on the legal protection of computer programs (Codified Version), COM(2008) 23 final of 28.01.2008.
- 28 See the European Parliament legislative resolution of 17 June 2008 on the proposal for a directive of the European Parliament and of the Council on the legal protection of computer programs (codified version) COM(2008) 0023, OJ C 286 E , 27.11.2009 p.61.
- 29 See Moon, K. (2013), at p. 194.
- 30 The original 1991 CPD placed a reporting duty on the Commission. The report was due in 1996, but was delayed given that only three Member States had implemented the Directive by that point. At the time of the 2000 report, implementation was complete in all Member States.
- 31 Report from the Commission to the Council, the EP and the ECSOC on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, COM(2000) 199 final, 10.04.2000, p. 15.
- 32 The CJEU has itself laid out the relationship between EU secondary legislation and international agreements on multiple occasions. In *Commission v. Germany*, it stated that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.” Regardless of the intention of the legislator, international agreements are hierarchically superior to secondary Community law. From the above, it is evident that the constraints of the WCT should have been given due consideration by the Court when examining the limitations of exhaustion. Indeed, it would have been possible to read the CPD in line with the WCT – largely as the AG set out – but the Court seemingly had different ideas. The CJEU later held that that “in particular where [Community legislation is] intended specifically to give effect to an international

- agreement concluded by the Community [it] must, so far as possible, be interpreted in a manner that is consistent with international law.” This citation is in fact given by the CJEU in the context of the EUCD, but is notably absent when it talks of the CPD, Ficsor, M. (2002) at p. 500. Citing Case C 341/95 Bettati [1998] ECR I 4355, paragraph 20, and Case C-306/05 SGAE [2006] ECR I-11519, paragraph 35
- 33 See *ibid.*, at 496.
- 34 That the right is intended to be freely categorised as communication or distribution as decided upon by the contracting parties themselves is made clear by an uncontested statement made by the US delegation at the Diplomatic conference which “stressed the understanding—which had never been questioned during the preparatory work and would certainly not be questioned by any Delegation participating in the Diplomatic Conference—that those rights might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights”. See WIPO, ‘Summary Minutes, Main Committee I, Document CRNR/DC/102’ (1996), Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva, 2 to 20 December 1996 at p. 41, para. 301; Ficsor, M. (2002), Chapter 4.
- 35 Ficsor writes of the Communication right being the ‘favourite’ candidate in the run up to the EUCD; Ficsor, M. (2002) at p. 504-506. An argument against digital transmissions being categorised as distributions could be made on the basis of the need for a systematic, coherent interpretation of the Directives covering the copyrightable subject matter. In relation to the EUCD, the ‘making available’ right appears under ‘communication’ and with the view of establishing a coherent *acquis communautaire*, the intent expressed in relation to the EUCD could be transferrable to the CPD also. This argument towards a coherent *acquis communautaire* is not a new one, and has previously been argued by von Lewinski, albeit in the context of a lack of international exhaustion in all the EU instruments.
- 36 The communication right can be ‘infinitely repeated’; see Case 282/81 *Coditel v. Ciné Vog Films II* [1982] ECR 3381.
- 37 See European Commission Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society COM (95) 382 Final, not published in the Official Journal, pp.56-60. However, categorization as a type of rental is still not convincing; the CJEU has clarified that exhaustion does not apply after the first rental. See Case C-61/97 *Foreningen af danske Videogramdistributører v. Laserdisker* [1998] ECR I-5171.
- 38 Note 26 above. This statement is not without basis, but is founded in the response by (then) Commissioner for Competition Mario Monti to a question from the European Parliament: Answer by Commissioner Monti to Oral Question H-0436/95 by Arthur Newens, MEP (11.7.1995), Debates of the EP (EN ed.) No. 466, p. 174.
- 39 Some commentators would disagree with this statement: For example, Linder and Shapiro state at p. 21 that “where the making available right is implemented as an online distribution right, the exhaustion principle cannot apply”. See Lindner, B. and Shapiro, T. (2011), *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (Cheltenham, UK; Northampton, MA: Edward Elgar 2011) at p. 21. For a contrasting view in line with that of the present author, see Chapter 4 in Walter, M.M. and Von Lewinski, S. (2010), *European Copyright Law: A Commentary* (Oxford; New York: Oxford University Press 2010) at p. 1010.
- 40 See Reinbothe, J. and Von Lewinski, S. (2002), *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths LexisNexis), p. 87, footnote 32.
- 41 The Berne Convention allows exceptions and limitations to the reproduction right, providing they meet the conditions of the ‘three step test’. Art. 5(b) of the EUCD permits MS to provide for an exception to the reproduction right for “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation”. Reproductions for resale purposes, as were at issue in *UsedSoft*, would clearly not fall within the scope of this exception.
- 42 See in more detail Linklater, E. (2013), ‘E-Books Distinguished, Not Exhausted’, 8 *Journal of Intellectual Property Law & Practice* 9, pp. 685-686
- 43 Batchelor, B. and Keohane, D. (2012), at p. 546.
- 44 *UsedSoft* at para.49.
- 45 Westkamp, G. (2007), ‘Intellectual Property, Competition Rules and the Emerging Internal Market: Some Thoughts on the European Exhaustion Doctrine’, 11 *Marquette Intellectual Property Law Review* 2, pp. 291-335, 335.
- 46 *UsedSoft* at para.62.
- 47 For an excellent and detailed reading of the ruling as “a clear example of the application of the continuing discussion of “online/offline equivalence”, see Nicholson, A. (2013), ‘Old Habits Die Hard?: *Usedsoft v. Oracle*’, *SCRIPTed*, 10(3), pp. 389-408, published online 07.10.13, available at <http://script-ed.org/?p=1167>, accessed 9/10/13 at p 389. Note that in this paper, the terminology ‘tangible-intangible’ rather than ‘online-offline’ is used. This is because the latter terms remain imprecise; downloads of content are always digital, but so, technically, are distributions of physical CD-ROMs; physical CD-ROMs can equally be purchased online through e-commerce channels or offline in stores. E-books and downloaded software are ‘pure digital’, however they may be transferred online or offline (e.g. a computer bought with the books pre-loaded). The author would like to thank Prof. Zsolt Balogh (University of Pécs) for pointing out this distinction.
- 48 *UsedSoft* at para. 61.
- 49 *UsedSoft* at para. 61.
- 50 On online-offline equivalence, see in particular: Reed, C. (2010), ‘Online and Offline Equivalence: Aspiration and Achievement’, 18 *International Journal of Law and Information Technology* 3, pp. 248-273; Schellekens, M. (2006), ‘What Holds Off-Line, Also Holds on-Line?’, in Bert-Jaap Koops et al. (eds.), *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* (The Hague: TMC Asser Press 2006), pp. 51-75.
- 51 However, to this it adds “in a situation such as that at issue in the main proceedings” (*UsedSoft* at para. 47). We could therefore see this as a qualified sentiment of equivalence, related to the structure of Oracle’s own distribution, whereby “at the customer’s request, the programs are also supplied on CD-ROM or DVD” *UsedSoft* at para. 21
- 52 *UsedSoft*, at para. 47. For some authors the requirement that the right of use be permanent limits the impact of the ruling (see Torremans, P. (2013) and Batchelor, B. and Keohane, D. (2012)).
- 53 *UsedSoft* at para. 79.
- 54 For example, a distinguishing feature between digital and physical situations that is not considered is that insofar as physical goods are concerned we, as consumers, are given the tools to judge for ourselves whether the copy is an original or not, and then make our decision to purchase. In the online world, we are devoid of this capacity by the fact that copied

digital files are exact replicas of the original: “This is not about second-hand bookshops and CDs in jumble sales” (Batchelor, B. and Keohane, D. (2012), at p. 545.). While for a pirated book, CD or DVD the quality difference is obvious from the very packaging, even if this does not affect the actual content, we essentially know what we are buying into. Legal certainty is jeopardized if this line becomes blurred, although as noted by Targosz this counter argument to digital exhaustion is not ‘insurmountable’ and can be overcome by use of metadata or “a clear rule placing the burden of proof of the legality of the transaction on the parties to it, who would be obligated to provide evidence confirming that they complied with all the requirements necessary for digital exhaustion.” (Targosz, T. (2010), ‘Exhaustion in Digital Products and the “Accidental” Impact on the Balance of Interests in Copyright Law’, in L. Bently, U. Suthersanen, and P. Torremans (eds.), *Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Cheltenham: Edward Elgar Publishing 2010), at p. 350-351.) Although his solution predates the *UsedSoft* ruling, it appears that this logic is what the Court had in mind when it stated that “it is permissible for the distributor – whether ‘classic’ or ‘digital’ – to make use of technical protective measures such as product keys (*UsedSoft* at para. 79)”.

- 55 Opinion of AG JÄÄSKINEN, delivered on 29 March 2012 in Case C-5/11 Criminal proceedings against Titus Donner [2012] ECR I-00000.
- 56 Tridimas, T. (1999), *The General Principles of EC Law* (Oxford: Oxford University Press 1999) at p. 44-48.
- 57 *Ibid.*, at p. 48.
- 58 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, OJ L 376 p.28 of 27.12.2006.
- 59 The reference is not yet listed on the Curia website, however the case has been confirmed by the Nederlands Uitgeversverbond (Dutch Publishers Association). See also the EBLIDA Newsletter, October 2013, p. 3, available at [http://www.eblida.org/Newsletter%20folder%20\(uploaded%20files\)/Newsletters-2013/2013_10_October.pdf](http://www.eblida.org/Newsletter%20folder%20(uploaded%20files)/Newsletters-2013/2013_10_October.pdf).
- 60 Case C-319/81 Commission of the European Communities v Italy [1989] ECR 601 at para.16: “even where it is impossible to perceive a sufficient degree of similarity between the products concerned, there are nevertheless characteristics common to all those spirits which are sufficiently marked for it to be said that they are at least partly or potentially in competition”.
- 61 From a comparative perspective, the technical processes that were taking place in the *UsedSoft* and *ReDigi* cases differed somewhat. In *ReDigi* – which concerned the resale of music downloaded from iTunes – the original downloaded file was ‘migrated’ from the first user’s computer to *ReDigi*’s cloud-based server (*ReDigi* a p.2). This word choice is significant because the sense is that at the end of the process, the file no longer exists on the user’s computer but only on the server. The user can then choose to keep it stored there to be accessed via streaming (whereby no copy would be downloaded) or to offer it for resale. If resold, access by the first user is blocked and the second user can download the file onto his or her device. In the *ReDigi* resale scenario the Court found there to be two breaches of the reproduction right: when the upload to the cloud takes place and when the new owner re-downloads the file. In the *UsedSoft* scenario, the CJEU found there to be none.
- 62 *ReDigi* at p. 5.
- 63 *ReDigi* at p. 6.
- 64 *UsedSoft* at para. 83.
- 65 Opinion of Advocate General Bot of 24 April 2012 in C-128/09 *UsedSoft* at point 100: “in the event of resale of the right to use the copy of a computer program, the second acquirer cannot rely on exhaustion of the right to distribute that copy in order to reproduce the program by creating a new copy, even if the first acquirer has erased his copy or no longer uses it”.
- 66 Torremans, P. (2013), at p. 7.
- 67 Article I, Section 8, Clause 8 of the United States Constitution.
- 68 *ReDigi* at p.13.
- 69 Torremans, P. (2013), at p. 3.
- 70 Looking at the CJEU’s ruling in *Nintendo* (Case C-355/12 *Nintendo v PC Box*, not yet reported), the role of the CPD is even more belittled. The Court found that “the special nature of the Software Directive means that its provisions take precedence over those of Directive 2001/29/EC, but only where the protected material falls entirely within the scope of the former” (see IP Kat blog post, ‘Nintendo ruling confirmed lex specialis nature of Software Directive: Implications for *UsedSoft* exhaustion?’, published online 26.01.2014, <http://ipkitten.blogspot.co.uk/2014/01/nintendo-ruling-confirmed-lex-specialis.html> (last accessed 10.02.2014)). Thus, video games, for example – which are in part computer programs but also contain images, sound and video that can be subject to copyright protection – would be covered by the EUCD not the CPD.
- 71 Batchelor, B. and Keohane, D. (2012), at p. 545.