Copyright, EU Exhaustion and E-books: The Example of *UsedSoft v. Oracle* applied to E-books

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1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. [...] 

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. [...]
“The economic performance of the cultural and creative sectors is recognised: in the EU they account for 3.3% of GDP and employ 6.7 million people (3 % of total employment)”

“Between 2008 and 2011, employment in the cultural and creative sectors proved more resilient than in the EU economy as a whole”
European Parliament
European Parliament resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs (2012/2302(INI))

European Economic and Social Committee
Opinion on the Communication - "Promoting cultural and creative sectors for growth and jobs in the EU", April 2013

Committee of the Regions
Opinion on the Communication - "Promoting Cultural and Creative Sectors for Growth and Jobs", May 2013
COPYRIGHT

LEGAL PROTECTION FOR AUTHORS AND RIGHTHOLDERS
EXHAUSTION

Once genuine goods have been put on the market for the first time by the rightholder or with his consent no one can impede their resale in the EU.
The CJEU characterised the making available of a copy of a computer program and the granting of a licence to download and use that copy permanently in return for the payment of a fee, as an operation involving the transfer of the right of ownership, and therefore as a sale of goods.
‘the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period’.
Basic Characteristics

+ The copy was a download from the Internet;
+ in return for a fee corresponding to the economic value of the work;
+ which conferred on the purchaser a right to use the copy for an unlimited period of time.
Yet,

It related to software...
It is the distribution right alone, which is exhausted and this right relates to works incorporated in a tangible article.
The InfoSoc Directive *leaves intact* and does not affect the legal protection of computer programs. That means that the Directive on computer programs is considered to be *lex specialis* in relation to the InfoSoc Directive although concepts in both Directives need to have the same meaning.

Art. 4(2) of the Software Directive (Directive 2009/24) refers to a ‘copy of a program’ without specifying that this copy should necessarily be a tangible one.
If a similar case arose in relation to e-books would e-books be treated as software?

Probably, Yes
whether a *sale* has taken place

and sale is defined as

*a transfer of ownership*
New Business Models

- Amazon
- Apple
- Evanidus
- ReDigi
Will developments in the US stop the tide?

The first sale doctrine applies to hard copy copyright works (international exhaustion)

*Kirtsaeng v. John Wiley & Sons, Inc* (19 March 2013)

(See also *Quality King Distributors Inc v. L’anza Research International Inc* (1998) and *Omega SA v. Costco Wholesale Corp* (2008))

But rejected it for digital files

*Capitol Records v. ReDigi* (30 March 2013)
Effects on the market and on cultural diversity
51. [...] digital and online tools and platforms offer unprecedented opportunities for the (Cultural and Creative Sectors) CCS to develop new business models, attract new audiences and expand their markets both within the Union and in third countries;

52. [...] the existence of 27 [now 28] different intellectual property rights management systems is a particular burden for Europe's CCS, and [...] the current fragmented regime needs to be reformed to facilitate access to, and increase (global) circulation of, content, and in such a way as to enable artists, creators, consumers, businesses and audiences to benefit from digital developments, new distribution channels, new business models and other opportunities;

53. [...] in the digital era, a modern and balanced system for protecting intellectual property rights (IPRs) which makes it possible both to ensure appropriate remuneration for all categories of rightholders and to guarantee that consumers have easy access to diverse, legal content and a real choice in terms of linguistic and cultural diversity, is an essential condition for ensuring that the CCS are competitive;