

35 PÉTER MEZEI: COPYRIGHT EXHAUSTION – LAW AND POLICY IN THE UNITED STATES AND THE EUROPEAN UNION (BOOK REVIEW)

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Péter Mezei, *Copyright Exhaustion – Law and Policy in the United States and the European Union*, Cambridge University Press, Cambridge, 2018, 211 p, ISBN 978-1107193680

Copyright Exhaustion is Péter Mezei's fourth monography and the first one written in English. The book fits into the row of his scientific oeuvre launched with *Digital Sampling and Filesharing*,¹ followed by *Filesharing Dilemma – Litigations are Slow, the Internet is Fast*² and the *Exhaustion in Copyright Law*.³ In these works he keenly seeks answers to the question whether new technologies raise challenges to copyright law on international, European and national level.

Copyright Exhaustion covers the legal instrument of the exhaustion and first-sale doctrines in the EU and the US, and as such, it is a very timely book.

The Introduction covers the definitions of the exhaustion (*Erschöpfung*, first-sale doctrine) doctrine. The author also presents the different interests at play in property rights and copyright, as well as the detailed theoretical and legal framework of exhaustion with special regard to the International and European norms, such as the TRIPS Agreement and the WIPO Internet Treaties. The norms of parallel import – the rules under which the copyright protected works enter into the circulation of goods in the given country – are also evaluated. In the European Economic Area, the common market, the free movement of goods foresees that states abstain from adopting regulations which can potentially hinder the principle of exhaustion. Thus, the EU decided to follow the principle of regional exhaustion.

In Chapter 2 the author summarizes the results of an in-depth analysis of the relevant rules of the European copyright regime as well as the relevant case law of the member states and the European Court of Justice. The historical development of the exhaustion

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1 Péter Mezei, *Digitális sampling és fájlcsere*, Szeged, 2010.

2 Péter Mezei, *A fájlcsere dilemma – a perek lassúak, az internet gyors*, HVG-ORAC, Budapest, 2012.

3 Péter Mezei, *Jogkimerülés a szerzői jogban*, NMHH, Budapest, 2016.

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doctrine is clearly presented through court decisions (*Deutsche Grammophon, Coditel, Cinétièque, Basset, Membran, Patricia, Corbusier, Blumquist, Warner Brothers v. Christiansen*) and the rules of the significant body of law of European copyright-related directives (Software Directive, Rental and Lending Rights Directive, Database Directive, InfoSoc Directive). From this remarkable deduction the author concludes that according to European copyright norms only tangible goods fall under the scope of the regional exhaustion doctrine. This finding is relevant since intangible goods are conveyed to the public within the framework of license agreements, which must be considered as services. The exhaustion doctrine can be applied only to the distribution of tangible copies based on sale contracts, gift or exchange agreements, which result in the transfer of ownership. Exhaustion is not applicable to the service-type distribution of works, such as rental and lending agreements, public performance, communication to the public, retransmission by cable and making available to the public.

The doctrine of exhaustion is one of those legal institutions which developed in parallel in Europe and in North America. In Chapter 3 the author examines the legal nature of the first-sale doctrine before and after the USCA by examining the relevant norms of the US Copyright Act of 1976 with special regard to the terminological uncertainty characteristic of it. He continues his assessment with the limitations on the first-sale doctrine by introducing the reader to the reasons why and how the first-sale doctrine was limited in the case of sound recordings and software, including the special case of film rental.

The well-known *droit de suite* is introduced not only in Chapter 2 but in Chapter 3 as well, but this time in the context of American copyright law. The complex topic of parallel import is also elaborated on. The relevant case law is sorted into three main groups. The author first introduces cases where works are produced abroad with the purpose of selling in the country of production, but later on they are exported to the US (*Nintendo of America v. Elcon Industries, Scorpio, Starks, Harms, Red Baron, BMG v. Perez, Omega v. Costco Kirstsaeng*). As a second group those cases are mentioned, where products are produced and distributed in the United States but are later on exported and then re-imported to the US (*Cosmair, Neutrogena*). The third group covers products that had been also produced in the United States with the explicit purpose of exporting to a third country where they should have been sold exclusively, but were then re-imported (*Sebastia, Quality King v. L'anza*).

In Chapter 4 the author examines leading cases in the field of digital copyright law. In *UsedSoft* the CJEU had to decide whether the right of distribution of the plaintiff Oracle is exhausted, if the computer programs are made available not on a tangible data carrier but in downloaded a digital format. It also had to be decided whether the license-key of the program had been exhausted after having been sold by the respondent. In *ReDigi* – a case from the US – phonograms were re-sold in a digital music store. The court had to decide whether this activity would result in the exhaustion of the right of reproduction.

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Next, the author brings the reader's attention back to Europe by giving a brief introduction to the legal practice of the German and Dutch courts regarding the re-sale of audio and e-books.

After analyzing the case law, Mezei criticizes the differences between license and sale contracts, as well as distribution and making available as a form of communication to the public. The migration of files and forward-and-delete technologies are also mentioned. As he puts it: the place of digital exhaustion does not depend on the type of the work, but rather on the type of data carrier, on which the work was distributed in the first place.

In Chapter 4 the main question is formed: do we really need digital exhaustion, or “[...] isn't it only a hype?” To answer this question, he assembles traditional and constructive approaches and arguments. As a conclusion, he puts his money on digital exhaustion by arguing that in a globalizing world, in order to maintain predictable competition and equality of rights, it is necessary to recognize a wide, international digital exhaustion.

All in all, Péter Mezei's book on exhaustion in copyright law is highly relevant, in particular in light of the hiatus in the relevant literature in the field of digital exhaustion. This gap is now filled with a work putting forward an insightful, modern, progressive point of view. His work also reminds us, that the difficulties in the 21st century can only be overcome, if all the fields of the given problem – in our case the right of distribution and the exhaustion doctrine – are revised with due consideration to the new social, economic and technical circumstances.