

Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union*, 2nd Edition (Book Review)

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As the author, Péter Mezei notes, “The doctrine of exhaustion, more commonly referred to within the US as the ‘first-sale’ doctrine, is one of the most fundamental principles of copyright law.”¹ The most fundamental principles of any legal discipline are especially challenging to research and write about; this is also the case for copyright law. This is because the principles that provide the foundations of specific fields of law are often regarded or treated as axioms; and axioms by their very nature are difficult, or even impossible to define. Furthermore, it is not uncommon for the origins and initially intended functions of these fundamental legal instruments to fade away or change significantly over the decades.² In our view, research on copyright exhaustion faces these very challenges. One of the great achievements of the recently updated book of Mezei is that the author was able to successfully tackle these challenges and peel away the dogmatic, historical, policy and practical layers of copyright exhaustion, to shed light on the very core of this legal instrument.

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1 Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union*, 2nd edition, Cambridge University Press, Cambridge, 2022, p. 2.

2 The three-step test is also a good example for this, see Dávid Ujhelyi, “That escalated quickly” avagy a háromlépcsős teszt és a paródia kapcsolódási pontjai – I. rész, *Industrial Property and Copyright Review*, 2019/6, pp. 7-41, at www.sztnh.gov.hu/sites/default/files/files/kiadv/szkv/szemle-2019-6/01.pdf.

The author's research³ is structured into four substantive chapters. The first chapter (*The Theory of Copyright Exhaustion*) deals with the dogmatic foundations of the legal instrument in question. The roots of copyright exhaustion – as a limit on the rightholder's exclusive rights – reach down to one of the most basic concepts and goals of the discipline, the balance⁴ between the authors and users (or society, in a wider sense). The author builds the four conceptual elements of exhaustion upon this basis, placing them on it just like the walls of a house are erected on the foundation. The 'walls' (or conceptual elements) of exhaustion are identified in the book as follows: (i) "the rightholder or another authorized person"; (ii) "lawfully distributes and thus transfers the ownership over"; (iii) "the original or a copy of a protected subject matter"; and (iv) "the lawful owner may resell the copy without the rightholder's permission."⁵

The policy considerations of copyright exhaustion are also discussed in this first chapter, where the Author recounts in great detail the conflict between the superiority of property rights over copyrights, the reward theory, and the restraint of rightholders over market control.⁶ As it is stated in the book, the taxonomy of copyright exhaustion is far from settled. In this regard, a number of options emerge, as the legal instrument may be considered a limitation, an exception, an exclusion, a restriction or even an implied license. Choosing one of these options is quite a serious task, and the decision has far reaching legal consequences. It is also worth noting that the Hungarian Copyright Act's codified text⁷ on exhaustion is unclear on this matter. Finally, the first chapter concludes with presenting the copyright exhaustion's place in the international legal

- 3 Some of the Author's recent publications on exhaustion: Péter Mezei, 'Digital Exhaustion: Furthering Social Justice in a Streaming-Dominated Copyright Ecosystem – Critical Remarks After the ECJ's Tom Kabinet Judgment', in Stanka Stjepanović et al. (eds.), *Zbornik radova: "Izazovi prabnom sistemu"*, Bosnia and Herzegovina, Pravni fakultet univerziteta u Sarajevu, 2021, pp. 190-203; Shubha Ghosh & Péter Mezei, 'The Elusive Quest for Digital Exhaustion in the US and the EU', *Hungarian Yearbook of International Law and European Law*, Vol. 8, 2020, pp. 249-275; Péter Mezei, 'The Doctrine of Exhaustion in Limbo: Critical Remarks on the CJEU's Tom Kabinet Ruling', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej*, Issue 2, 2020, pp. 130-153; Péter Mezei, 'Meet the unavoidable – the challenges of digital second-hand marketplaces to the doctrine of exhaustion', in Pihlajarinne Taina et al. (eds.), *Online Distribution of Content in the EU*, Edward Elgar, 2019, pp. 62-78.
- 4 Christophe Geiger & Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression', *International Review of Intellectual Property and Competition Law*, Vol. 45, 2014, pp. 326-339; and Anett Pogácsás, *Különbözőség az egységben – A szerzői jogi szabályozás differenciálódásának hatása a jogterület szerepére és hatékonyságára*, Pázmány Press, Budapest, 2017, at <http://mek.oszk.hu/18600/18679/18679.pdf>.
- 5 Mezei 2022, pp. 9-10.
- 6 A similar conflict arises between IP rights and freedom of expression regarding parodies. See Dávid Ujhelyi, *A paródiakivétel szükségessége és lehetséges keretrendszere a hazai szerzői jogban*, Ludovika Egyetemi Kiadó, Budapest, 2021.
- 7 Hungarian Act LXXVI of 1999 on Copyright Law, Section 23(5).

framework, with due consideration to the TRIPS agreement,⁸ the WIPO internet treaties⁹ and the Marrakesh VIP Treaty.¹⁰

The second chapter (*The Doctrine of Exhaustion in the Copyright Law of the EU*) logically continues with EU level analysis. The founding Member States' quite different approach was gradually harmonized through the CJEU's practice and judgments, such as *Deutsche Grammophon*,¹¹ *Membran*,¹² *Coditel I*,¹³ *Warner Brothers versus Christiansen*,¹⁴ and *EMI versus Patricia*.¹⁵ These cases paved the way for a uniform EU exhaustion regulation, such as the rule that contractual provisions conflicting with exhaustion cannot be enforced against third parties, the exhaustion of the distribution right is allowed by the first lawful distribution, the free movement of goods and the theory of the common market enjoy priority over copyright law and different royalty rates applied by Member States on the reproduction and distribution of copies are not grounds for preventing the resale of lawfully marketed copies.¹⁶ Following the successful groundwork of the CJEU, the road for adopting vertical and horizontal EU legislation became free: the first Software Directive,¹⁷ the Directive on Rental, Lending and Related Rights,¹⁸ the Database Directive¹⁹ and the InfoSoc Directive²⁰ all regulate relevant norms on copyright exhaustion. The second chapter also tackles the limitations on copyright exhaustion that arise from the internal logic of EU law, such as parallel importation,²¹ regional exhaustion and *droit de suite*.²²

The picture would not be complete without a separate chapter on the US first sale doctrine. The third chapter (*The First-Sale Doctrine in the Copyright Law of the*

- 8 Agreement on Trade-Related Aspects of Intellectual Property Rights, The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
- 9 WIPO Copyright Treaty, adopted in Geneva on December 20, 1996 and WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996.
- 10 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on 27 June 2013.
- 11 Judgment of 8 June 1971, *Case C-78/70, Deutsche Grammophon*, ECLI:EU:C:1971:59.
- 12 Judgment of 20 January 1981, *Joined Cases C-55/80 and C-57/80, Gema*, ECLI:EU:C:1981:10.
- 13 Judgment of 6 October 1982, *Case C-262/81, Coditel*, ECLI:EU:C:1982:334.
- 14 Judgment of 17 May 1988, *Case C-158/86, Warner Brothers and Metronome Video*, ECLI:EU:C:1988:242.
- 15 Judgment of 24 January 1989, *Case C-341/87, EMI Electrola*, ECLI:EU:C:1989:30.
- 16 Mezei 2022, pp. 48-49.
- 17 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.
- 18 Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
- 19 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
- 20 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
- 21 Owen H. Dean, 'Parallel Importation – Infringement of Copyright', *South African Law Journal*, Vol. 100, Issue 2, 1983, pp. 258-277.
- 22 Marilyn J. Krestinger, 'Droit de Suit: The Artist's Right to a Resale Royalty', *Hastings Communications and Entertainment Law Journal*, Vol. 15, Issue 4, 1992, pp. 967-980.

US') accordingly provides a comprehensive overview of this legal instrument. This is all the more instructive because it goes back a long way, since US federal courts had been grappling with this issue as early as 1885. "As a direct consequence, the US has experienced far more varied technological and economic challenges regarding the functioning of the limits to the right of distribution."²³ Mezei draws attention to the fact that in the EU the *droit de suite*, as a right for an equitable remuneration, functions as a practical limitation to the doctrine of exhaustion, since free resale is one of the central elements of the doctrine of exhaustion. However, there is no such limitation in US copyright law, in fact, US legislators will be presumably unable to find an internal solution for the resale right in the foreseeable future.²⁴

The idea of digital exhaustion is rooted in technological, social and economical changes. Leaving aside a detailed description of the book's most interesting fourth chapter ('*Digital Exhaustion in the EU and the US*'), it is worth pointing out the book's greatest merit and also a key question of the topic. Mezei argues for a more flexible interpretation of international rules to enable copyright law to adapt to the present day, however, the presentation and analysis of the opposing position, the traditional positivist approach, is not neglected either. In the author's view, categorizing the sale of digital contents via the Internet as distribution would implicitly open the door for a digital exhaustion doctrine. "I believe that such an interpretation of the international norms would not contradict WCT Article 1(4) and BC Article 19."²⁵ As Caterina Sganga also underlines,

"the advisability of complementing the purely positivistic interpretation of the provision with a deeper consideration of the social, economic and cultural implications of exhaustion, and of its role in facilitating the achievement of copyright goals is at stake."²⁶

Adapting copyright to its original purpose would certainly be easier to achieve by amending the relevant international conventions. Not surprisingly, however, the author himself does not see much chance of this happening. But the book's greatest strength is that it does not stop at the seemingly insurmountable, clear obstacles. Despite the fact that no substantial progress can be expected from international conventions, and that the relevant CJEU's judgments further deepened uncertainties in this field,²⁷ it remains its objective to work on making exhaustion a special limitation, functioning effectively in EU copyright law. To this end, Mezei paves the way for a change of perspective and encourages us to see not only the obstacles, but also the possible solutions, maintaining that "a

23 Mezei 2022, p. 71.

24 Id. p. 105.

25 Id. p. 197.

26 Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law', *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law*, Vol. 9, Issue 3, 2018, p. 212.

27 Mezei 2020, p. 130.

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balanced digital exhaustion doctrine can be reached by the combination of technological measures and legal guarantees.”²⁸

Therefore, the book is highly recommended not only for those who wish to familiarize themselves with all aspects of the doctrine of exhaustion, but those who want a glimmer of hope in the desperate battle of the increasingly complex, inconsistent and unbalanced copyright law itself.

28 Mezei 2022, p. 191.