Dissemination of digital copies of copyright protected works in the digital environment

In EU law, with a national law perspective

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"Only one thing is impossible for God: to find any sense in any copyright law on the planet.” – Mark Twain
1 Introduction

1.1 The matter at hand: Digital dissemination of digital copies of copyright protected works

1.1.1 The issue
Copyright is the legal field that cover the protection of literary or artistic intellectual creations, the work.\textsuperscript{1} The work is immaterial, but is made available to the public in the form of originals and copies.\textsuperscript{2} These can be in physical/tangible or digital/intangible form. Economic revenue from the work mainly comes from the exclusive rights copyright grant to control its exploitation.

Imagine a physical copy of a book, an original or copy of a work in the above understanding. You can buy a physical copy of a book at a bookstore, or have one sent to you. Distribution is the exclusive right to the sale or other transfers of ownership to an original or a copy of the book. The distribution right only extends to the first sale, and sometimes other transfers of ownership, this is known as the exhaustion principle. It leaves the acquirer free to redistribute the original or copy of the book.

Alternatively, you can borrow a book at a library. European Union (hereinafter EU) law establishes the exclusive right to the lending of originals and copies of a work. An act of lending covers the making available of originals and copies for a limited amount of time, and not for direct or indirect commercial purposes.

The lending right is limited by the Public Lending Right (PLR) derogation. It allows the Member States of the EU to make an exception from the exclusive lending right for lending by public libraries as long as the original creator of the work (the author) receives remuneration.

Now, imagine a digital copy of a book, e.g. an ebook. You can “buy” a copy of an ebook by download, and in many EU countries you can “borrow” an ebook from a public library. These acts have however not traditionally been considered acts of distribution or lending, but rather acts of communication or making available to the public that include an act of reproduction.

The digital dissemination process involves the creation of a new copy on the hand of the receiver, where in the physical process one physical copy is exchanged.

The exclusive right of communication and making available to the public cover such acts done by wire or wireless means, simultaneously or at a time and place chosen by the user. These acts are subject to neither exhaustion nor the PLR derogation.

\textsuperscript{1} Rognstad(2009), p. 15
\textsuperscript{2} Rognstad(2009), p. 35
The exclusive right to *reproduction* is the right to make new copies of a work. It covers whole and partial, permanent and temporary copies, whether in physical or digital form. In the following, I will use *dissemination* as a collective term for how copyright protected works are distributed, lent, communicated, made available or in other ways transferred to the public.

### 1.1.2 Research problem

The specific issue this thesis will address is the classification of acts of digital dissemination. This is one of several topical copyright issues in the context of digital information and communications technology, (ICT) as for instance the internet.\(^3\) The traditional view has been that all acts of digital dissemination are acts of communication to the public, and that the exclusive rights of distribution and lending with applicable exceptions do not apply in the digital context.\(^4\) In this understanding, an act of digital dissemination necessitates both a dissemination, an act of communication to the public, and a reproduction.\(^5\)

However, in some cases, an act of digital dissemination will share the central characteristics of an act of distribution or lending. In two relatively recent judgments, the Court of Justice of the European Union (CJEU) concluded that respectively the distribution right and lending right also apply to acts of digital dissemination. In UsedSoft GmbH v Oracle International Corp. Case C-128/11 (UsedSoft) the court dealt with digital distribution and exhaustion for computer programs. In Vereniging Openbare Bibliotheeken v Stichting Leenrecht Case C-174/15 the court dealt with digital lending by libraries and the public lending right derogation. In the following, with basis in the two judgments referred, I will address the *de lege lata* situation for acts of digital distribution and digital lending in EU law. I will address whether the two judgments of the CJEU amount to a similar approach to the application of rights on acts of digital dissemination. Finally, I will attempt to outline what I perceive as the best regulatory solution for acts of digital distribution and lending in a *de lege ferenda* perspective.

### 1.1.3 Limitations

In this thesis, I will focus on two acts of digital dissemination, digital distribution and digital lending, and their relationship with the communication and reproduction rights. In the part dealing with digital distribution, I will focus on two acts of EU secondary legislation, the Software Directive\(^6\) and the InfoSoc-directive.\(^7\) I will not address the issue directly in

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3 Techterms, ICT
7 InfoSoc-directive (2001/29/EC)
the context of related rights, established in part two of the Rental and Lending Directive, or for databases, established in the Database Directive.

The allowed length of this thesis, and the amount of issues dealt with, has meant that certain issues will be dealt with in a more abbreviated fashion.

1.2 The legal area: Copyright law

1.2.1 General copyright law

Copyright is the law that regulates the protection of the original intellectual creations of authors in the literary, scientific and artistic fields. Protection requires an original intellectual creation of an author in these fields. These are the three demands for copyright protection. Copyright understood in a wider sense also protects neighboring rights, like the rights of performers and producers.

1.2.2 Substantive copyright law

Copyright grants the copyright holder exclusive rights to “use and exclude others from using” intellectual property. The exclusive rights cover the right to reproduce the work and different rights to make it available to the public. While the classification may vary in different legal systems, they normally cover the same scope of protection.

The author has the moral rights to be named as the author of the work and not to have the work distorted or modified in a way that affects his honor or reputation. The author is the primary copyright holder, but the exclusive rights can be transferred to a third party by inheritance or contract. The moral rights cannot be transferred. Copyright protection is limited in the scope and time, and there are different forms of permitted use. Restricted acts can be permitted by compulsory licenses in return for fair remuneration, or by extended collective licenses when agreed with a collective management society.

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8 Rental and Lending Directive (2006/115/EC)
9 Database Directive (96/9/EC)
10 Berne Convention for the Protection of Literary and Artistic Works (Berne Convetion) art. 1 and 2; Rognstad(2009), p. 15
11 WIPO(2004), p. 42; see also Rognstad(2009), p. 77
12 Rognstad(2009), p. 15
13 Kur and Dreier(2013), p. 2
14 Rognstad(2009), p. 36
15 Berne Convention art. 6bis (1)
16 Rognstad(2009), pp. 119, 337
17 Ibid. p. 212
In theory, exceptions and limitations are sometimes understood as different concepts. In the following, I will generally use the term exceptions for the sake of simplicity.

1.2.3 Copyright in EU law
EU copyright law has been adopted in a piecemeal manner, with the exception of the general approach of the InfoSoc-directive. There are currently 11 directives and 2 regulations on copyright in EU law. Other acts of secondary legislation may also contain provisions that have effect in the legal field of copyright.
EU copyright law is undergoing modernization as part of the Digital Single Market strategy, one of the European Commission’s ten stated current priorities. Its aim is “[m]odifying copyright rules to reflect new technologies, and to make them simpler and clearer.”
EU copyright law aims to establish a high level of copyright protection, and “a level playing field” for market forces “ensuring the adequate protection of intellectual property rights and providing the opportunity for satisfactory financial returns on investment to be made.”

1.3 Legal background: European Union law

1.3.1 Introduction
This thesis primarily deals with EU law, some central aspects are therefore summarized shortly below. The EEA agreement extends the areas of EU law covered by the treaty to the three EFTA-countries, Norway, Iceland and Liechtenstein. The legal analysis of Norwegian law is based on the recognized legal method of the Norwegian legal system.

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19 Kur and Dreier(2013), p. 244
21 Regulation implementing the Marrakech Treaty in the EU (2017/1563/EU); Portability Regulation (2017/1128/EU)
22 European Commission, Priority: Digital Single Market
23 European Commission, Priorities
24 European Commission, Priority: Digital Single Market
25 COM(96) 568 p. 7; See Infopaq International A/S v Danske Dagblades Forening Case C-5/08 para. 56 with referred case law
26 Agreement on the European Economic Area (EEA agreement) art. 1 (2)
1.3.2 European Union law

European Union law, or the community acquis, is “the body of common rights and obligations that is binding on all the EU member states.”27 The EU and by extension EU law is supranational, as it is established on sovereign competences conferred to it by the Member States.28

1.3.3 Sources of EU law

Primary, secondary and supplementary legislation, make up the substantive part of EU law. Primary law includes the foundational treaties, the Treaty on the European Union, (TEU) the Treaty on the Functioning of the European Union, (TFEU) and the Charter of Fundamental Rights of the European Union.29

Secondary law encompasses unilateral acts and agreements made by the EU. This includes the typical unilateral acts regulations, directives, decisions, recommendations and opinions listed in TFEU art. 288. Regulations are directly applicable in the legislation of the Member States, directives are only binding as to the result to be achieved, and decision are binding for those to which they are directed. Atypical unilateral acts include communications, atypical recommendations, white and green papers. The agreements cover international agreements of the Union, agreements between the member states and agreements between the institutions of the EU.30

Supplementary law includes the case law of the CJEU, the general principles of EU law established by the CJEU, and the law, custom and usage of international law.31

1.3.4 Method of EU law

1.3.4.1 Who interprets EU law?

The CJEU is the normative interpreter of EU law, as established in the treaties and the courts own jurisprudence.32 The court decides on the interpretation of EU law in the last instance.33 The interpretations of the court have de facto normative effect, and national courts can rely on previous interpretations of EU law to avoid repeated references.34 The CJEU considers itself

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27 European Commission(2016)
28 Kiljunen(2004), p. 21-23, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration Case C-26/62 II B
31 Eur-lex(2010a)
32 TEU art. 19 (1); Joined Cases C-402/05 P and C-415/05 P para. 281
33 Dreier and Hugenholtz(2016), p. 5
solely competent to interpret “autonomous concepts of EU law”. These must be interpreted equally throughout the EU.\textsuperscript{35}

The CJEU must interpret EU law to avoid a normative result “contrary to the spirit of the Treaty [or] its system”.\textsuperscript{36} It should however not encroach on the competence of other EU institutions by “setting aside the condition in question expressly laid down in the treaty”. This is considered contrary to the principles of inter-institutional balance and sincere cooperation.\textsuperscript{37}

The CJEU can deliver orders, preliminary rulings and opinions. A preliminary ruling answers references from national courts on the validity or interpretation of EU law, or its impact in the legislation of the Member States.\textsuperscript{38} National courts have a right to submit references. Courts judging in the last instance have a duty, unless the interpretation is “so obvious as to leave no scope for any reasonable doubt”.\textsuperscript{39}

An Advocate General supplies the court with an Opinion, unless “the case raises no new point of law”.\textsuperscript{40} The Opinion “sets out the AG’s view of the law, and recommends how the case should be decided.”\textsuperscript{41} It is normally more comprehensive than the judgement, and is often followed by the court.\textsuperscript{42}

\subsection*{1.3.4.2 How is EU law interpreted?}

The CJEU’s interpretative method consists of textual, contextual and teleological interpretation. These are the “classical methods of interpretation”, recognized in national legal systems and public international law.\textsuperscript{43} “[T]he characteristic features of Community law and the particular difficulties to which its interpretation gives rise” must be taken into account in case they lead to a different result in EU law.\textsuperscript{44}

The wording of an act of legislation is the first and primary source when interpreting EU law. Textual interpretation is “the action of explaining what a normative text conveys by looking at the usual meaning of the words it contains.”\textsuperscript{45} All EU legal acts are official and equally valid in all 28 official languages of the Union.\textsuperscript{46} This gives the interpretation of EU law a multilingual dimension.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35} Dreier and Hugenholtz(2016), p. 5
\item \textsuperscript{36} CFREU art. 47; Parti écologiste "Les Verts" v European Parliament Case C-294/83 para. 25
\item \textsuperscript{37} TEU art. 13 (2); Lenaerts and Gutiérez-Fons(2013), p. 3
\item \textsuperscript{38} TFEU art. 267 (1); Hartley(2014), p. 57
\item \textsuperscript{39} TFEU art. 267 (2) and (3); C-283/81 para. 16
\item \textsuperscript{40} Statute of the Court of Justice of the European Union art. 20
\item \textsuperscript{41} Craig and De Búrca(2015), p. 61
\item \textsuperscript{42} I.c.
\item \textsuperscript{43} Lenaerts and Gutiérez-Fons(2013), p. 4
\item \textsuperscript{44} C-283/81 para 17
\item \textsuperscript{45} Lenaerts and Gutiérez-Fons(2013), p. 6
\item \textsuperscript{46} C-283/81 para. 18
\end{itemize}
\end{footnotesize}
The contextual method of interpretation denotes the interpretation of a provision of EU law in its normative context. The EU must “ensure consistency between its policies and activities, taking all of its objectives into account”\(^{47}\) and ensure the EU legal system is “consistent and complete”.\(^{48}\) Secondary legislation must be interpreted in the context of the legal act of which it is part, the respective legal area and EU law as a whole and their objectives and the state of evolution of EU law when the provision is applied.\(^{49}\)

The preparatory works of EU legal acts are a source of contextual interpretation. Traditionally EU preparatory works were generally not available, but they are now generally used by the CJEU to clarify the interpretation of EU legislation.\(^{50}\)

The Commission, the European Parliament and the Council are all sources for preparatory works. It is important to note what agree on beyond the final text, whether they take sufficient regard of societal changes and if they contain sufficient clarity or detail.\(^{51}\)

The method of teleological interpretation interprets EU law in line with “objectives of paramount constitutional importance”.\(^{52}\) Since the objectives are general in formulation, the result of a teleological interpretation is hard to predict.\(^{53}\)

There are three types of teleological interpretation. Teleological interpretation in \textit{sensu strictu}, interprets a provision to achieve the objective it pursues. The \textit{effet utile} or effectiveness looks to achieve the practical effect of a provision in line with the objectives of EU law. Teleological interpretation in a consequence perspective considers the consequences of an interpretation to avoid it jeopardizing the attainment of the objectives of EU law.\(^{54}\)

Moreover, the CJEU can rely on international law and the common constitutional tradition of the Member States, as long as they do not call into question the constitutional autonomy of the EU legal order.\(^{55}\)

International agreements binding to the Union has direct effect and primacy in EU legislation. Any act of secondary legislation must as far as possible be interpreted consistently with such obligations.\(^{56}\) The court can also use a comparative analysis of the general principles common to the legal systems of the Member States to clarify an interpretation of EU law.\(^{57}\)

\(^{47}\) TFEU art. 7
\(^{48}\) Lenaerts and Gutiérrez-Fons(2013), p. 13
\(^{49}\) C-283/81 para. 20; Von Lewinski and Walter(ed.) (2010), p. 22-23
\(^{50}\) Lenaerts and Gutiérrez-Fons(2013), p. 19-21
\(^{51}\) Ibid., p. 20-21
\(^{52}\) Ibid., p. 24
\(^{53}\) Von Lewinski and Walter(ed.) (2010), p. 23
\(^{54}\) Lenaerts and Gutiérrez-Fons(2013), p. 24-25
\(^{55}\) Ibid. p. 5-6
\(^{56}\) Ibid. p. 29 ff
\(^{57}\) Lenaerts and Gutiérrez-Fons(2013), p. 35 ff
To deviate from a “clear and precise” wording goes against the principle of legal certainty and the inter-institutional role of the court.\textsuperscript{58} In the absence of a clear and precise wording, other methods of interpretation are relevant.\textsuperscript{59}

A clear and precise wording can give rise to gaps in the legislation that are incompatible with primary EU law or an excessively broad interpretation of a provision that is unfair, has not been foreseen or are contrary to the objectives pursued by the EU legislator. The CJEU will counteract such effects by a teleological interpretation, even in conflict with the wording.\textsuperscript{60}

\begin{flushright}
\begin{tabular}{l}
\textsuperscript{58} European Commission v United Kingdom of Great Britain and Northern Ireland Case C-582/08 para 49 and 51 \\
\textsuperscript{59} Lenaerts and Gutiérez-Fons(2013), p. 7 \\
\textsuperscript{60} Ibid. p. 27
\end{tabular}
\end{flushright}
2 Background

2.1 Introduction

In the following substantive treatment, it will become clear that certain theoretical approaches are relevant in a general perspective. I will therefore shortly address the technical specifics of digital technology and certain general theoretical approaches to copyright in the digital environment below.

2.2 Digital technology

The changes in copyright regulation of recent times are largely a consequence of the development in digital technology. The technological development can be seen in the global communication networks and structures of the information society. Marked technological advances in areas like data memory capacity, compression technology and communication speed has increased both their usability and availability.61

Three major areas of technological development can be outlined: the capacity to store more data locally, to store more data using less computer memory and the ability to communicate data at consistently increasing speeds. The rise and proliferation of high-speed internet access has made local storage less important. Technological solutions like cloud computing and streaming makes it possible to disseminate copyright protected content as pure services without any permanent transfer of copies of copyright protected works.62

2.2.1 Digital dissemination and digital copies

The concepts of digital copies and their digital dissemination have been two prominent developments in copyright law in response to digital technology.

The existence of digital copies is a basic concept of copyright law, as the exclusive right to reproduce copies of copyright protected works is technology neutral. The Berne Convention establishes in art. 9: “the exclusive right of authorizing the reproduction of these works, in any manner or form.” This concept is shared by the WIPO Copyright Treaty (WCT) and at EU level.63

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61 Von Lewinski and Walter(ed.)(2010), p. 937
62 See for example: Wiebe(2009), p. 9
63 WCT art. 1 (4), Agreed Statement to the WCT art. 1 (4) and InfoSoc art. 2
On this basis, three categories of digital copies can be outlined: transient or incidental copies; temporary copies that exist beyond the transient and incidental; digital copies that have effectively been permanently transferred.

In this, we can see a clear analogy between digital copies of some longevity and physical copies disseminated temporarily or permanently. The transient or incidental copies on the other hand have digital characteristics, which make them essentially different from physical copies. Digital copies can be digitally disseminated. Traditional physical dissemination takes place by the transfer of one physical tangible copy. Digital dissemination happens through transfer of information over communication structures like the internet. The information at the hand of the disseminator is broken into data packets containing the information making up the original copy of the work. The data packets are transferred to the receiver, where they are unpacked and a local reproduction of the transmitted work is made. The transfer can happen by electric pulses in copper cables, photons in a fiber optic cables or radio waves in a Wi-Fi system. Digital dissemination therefore takes place through an act of dissemination and an act of reproduction.

In principle, the creation of a new copy in act of digital dissemination does not affect the original copy. This is in contrast with the dissemination of a physical copy, where the copy changes hands. So-called “forward and delete” technology address this issue. It ensures that the disseminated copy is deleted when the copy is disseminated. The effectiveness of these solutions has been questioned, and it is hard to confirm that the disseminator for instance does not keep a back-up copy.

2.3 General theories

2.3.1 The Umbrella Solution

The Umbrella Solution is the name given to the classification of acts of digital dissemination in the WCT. It classifies acts of digital dissemination under the new making available right. It also determines that the distribution right and the rental right should not apply to acts of digital dissemination. They apply “exclusively to fixed copies that can be put into circulation as tangible objects.”

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64 See below in 2.3.1 and 4.2.2.2; for an example, see: C-360/13
65 Like a lent copy, see: C-174/15
66 Like a distributed copy, see: C-128/11
67 Rognstad(1999), p. 63
68 Lifewire(2017b)
69 Small Business Trends(2017)
70 United States Copyright Office(2001), Section III B 1a
71 Ficsor(2002), pp. 204-206, 496-500
72 WCT Agreed Statement Concerning art. 6 and 7
The Umbrella Solution does however leave the signatory states free to classify acts of digital dissemination the way they wish, as long as the level of protection of the making available right is maintained.\textsuperscript{73} Importantly, exhaustion of the distribution right should not apply to acts of digital dissemination.\textsuperscript{74} Any exceptions to the making available right must therefore pass the three-step test as established in WCT art. 10.

There is little information in the literature on the rationale for not allowing exhaustion to apply to acts of digital dissemination. The one clear consideration mentioned is the fundamental technological difference between the digital and physical dissemination process: That digital dissemination happens through the creation of a new copy.\textsuperscript{75} The preparatory works to the InfoSoc-directive also mention the danger of piracy and ease of reproducing digital copies.\textsuperscript{76} These will most likely also have played a role.

The Umbrella Solution classifies an act of digital dissemination as an act of communication or making available that include an act of reproduction.\textsuperscript{77} I will therefore shortly address the communication right and the reproduction right.

InfoSoc art. 3 establishes the:

“right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”\textsuperscript{78}

An act of communication covers a simultaneous dissemination, while an act of making available covers access to a work “from a place and at a time” chosen by the member of the public. Public is a broad term, which also covers successive individuals.\textsuperscript{79} Recommmunicating a work that has been communicated or made available to the public by the right holder or with his consent is only within the scope of the exclusive right if it is directed at a “new public”: A public not taken into account when the copyright holder authorized the first communication.\textsuperscript{80} The making available right was a new right established in WCT art. 8, specifically meant to protect non-simultaneous acts of communication in a digital online context.\textsuperscript{81}

\textsuperscript{73} Ficsor(2002), p. 496-498
\textsuperscript{74} Ficsor(2002), p. 208-209
\textsuperscript{75} See Ficsor(2002), p. 204-209 and Ficsor(2005), p. 15
\textsuperscript{76} See COM(96) 568 final, p. 9 and 12
\textsuperscript{77} See to this effect Sganga(2016), p. 11
\textsuperscript{78} InfoSoc art. 3 (1)
\textsuperscript{79} Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA. Case C-306/05 para 38
\textsuperscript{80} Nils Svensson and Others v Retriever Sverige AB Case C-466/12 para 24
\textsuperscript{81} Von Lewinski and Walter(ed.)(2010), p. 975
InfoSoc art. 2 establishes “the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”. InfoSoc rec. 21 establishes that “reproduction” must be given “broad definition”. The term “direct or indirect” means that the reproduction right covers necessary acts of reproduction made indirectly as part of the reproduction process. The term “in whole or in part” means that also partial reproductions are covered, as long as the part reproduced still amounts to a work. The CJEU has determined that an 11-word excerpt of an article can merit copyright protection, without that being a lower limit. The term “temporary or permanent” means that the reproduction right also covers purely transient and incidental acts of reproductions. For instance, in the memory of an internet browser or on a computer screen. Transient or incidental reproductions will in most cases be covered by the exception in art. 5 (1). The term “by any means or in any form” means that the reproduction right is technology neutral and that digital reproductions are covered.

InfoSoc art. 5 establishes an exhaustive list of exceptions from the communication and reproduction rights. Art. 5 (1) contains the one mandatory exception from the reproduction right, for transient and incidental acts of reproduction in a technological process. Art. 5 (2) contains four optional exceptions to the reproduction right. Art. 5 (3) contains 15 optional exceptions from the reproduction and communication rights. Art. 5 (5) makes the exceptions subject to the three-step test: They shall only apply in specific cases, that do not conflict with the normal exploitation of the work and that do not prejudice the legitimate interests of the right holder.

2.3.2 The free movement rules

The freedom of movement rules prohibit restrictions on free movement of goods, services, workers or capital in the internal market of the EU. The CJEU has used the rules to limit to the degree to which national copyright legislation can impede the free movement of goods and services.

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82 Dreier and Hugenholtz(2016), p. 439
83 Ibid. p. 440
84 C-5/08 para. 51
85 C-360/13 para. 21
86 C-360/13 para. 52
87 Dreier and Hugenholtz(2016), p. 439
88 InfoSoc rec. 32
89 TFEU art. 26; for more information see Barnard(2013)
90 TFEU art. 28 ff; Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG Case C-78/70
91 TFEU art. 56 ff; Coditel v Ciné Vog Films Case C-62/79
It is generally accepted that copyright can limit free movement in the internal market.\textsuperscript{92} The CJEU has however determined that it can only do so to the extent it safeguards the “specific subject matter of the intellectual property concerned”.\textsuperscript{93}

For the free movement of goods, which cover the distribution right, the CJEU has determined that its specific subject matter is the first sale.\textsuperscript{94} Protection of distributions beyond the first sale is an impediment to the free movement in the internal market that cannot be justified in EU law. This established exhaustion in EU law.

For the free movement of services the CJEU has determined that the specific subject matter of a service is appropriate remuneration for each use. As a service can be endlessly repeated, it is impossible to calculate a fee for future use of the service. It can therefore not be exhausted by the price for the first use.\textsuperscript{95} Rental and lending, communication and making available to the public must all be considered services.

The traditional view in legal theory and held by the CJEU is that goods are physical objects, while services are intangible. The CJEU has traditionally not been altogether consistent on delineating goods and services, labelling electricity as goods and lottery tickets as services.\textsuperscript{96}

It has specifically not taken a uniform approach on digital content.\textsuperscript{97} The tangible or intangible nature of goods or services is therefore not necessarily the decisive factor in their classification.\textsuperscript{98}

Substantially, an act of distribution requires a transfer of permanent control of an original or copy and it is therefore not repeatable as opposed to services. It has been questioned in legal theory how acts of digital dissemination that share the central characteristics of an act of distribution should be classified.\textsuperscript{99}

Wiebe outlines three categories of dissemination as an alternative to the traditional goods/services dichotomy. Acts of dissemination of copyright protected works on a material medium; acts of digital dissemination that share the central characteristics of the delivery of goods, namely the transfer of permanent control of a copy; dissemination purely as a service “without a digital copy of a work being transmitted or made available to the user”.\textsuperscript{100}

In the second type of cases, the logic that denied the application of exhaustion to services does not apply. They involve a permanent transfer of control, and a fee can arguably be calculated.

\begin{footnotes}
\item[92] TFEU art. 36; Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd. Joined Cases C-403/08 and C-429/09 para. 104
\item[93] C-78/70 para. 11; Joined Cases C-403/08 and C-429/09 para. 105-106
\item[94] C-78/70 para. 12
\item[95] C-62/79 para. 12-15
\item[96] See Hojnik(2017), p. 64-65 with referenced case law.
\item[97] Ibid. p. 72
\item[98] Ibid. p. 67-68
\item[99] Wiebe(2009), p. 115-116
\item[100] Wiebe(2009), p. 115
\end{footnotes}
Therefore the application of digital exhaustion on the basis of the freedom of movement rules can be argued in these cases.

2.3.3 In summary
The Umbrella Solution and the goods/services distinction are two approaches to the same issue, the level of copyright protection afforded to acts of digital dissemination.
In our context, they are both faced with the same problem. Acts of digital dissemination that to some degree are copy based, that are not endlessly repeatable and does not adhere to the general logic of the solutions. The Umbrella Solution takes a clear formalistic stance to this. All acts of digital dissemination shall have the level of protection of the making available right, whatever the specific substantial characteristics of the act of dissemination.101 The evaluation of the goods/services dichotomy is, as I will demonstrate, more complicated.

2.4 Theoretical approaches to the level copyright protection

2.4.1 The balance of interests perspective
Copyright is a legal field based on a dichotomy in interests for exclusivity and access. It aims to balance the economic benefit for creators and copyright holders to incentivize further creation, with the interests of the public in access to culture, science and information.102 There are three general interest groups in copyright regulation. Authors or creators favor protection to ensure remuneration for exploitation of their work, but benefit from access to the body of copyright protected works of others in their own creation. Producers, like publishers, want protection to recoup their investment in the creation of works, but also value the possibility to include elements from previous works in further creation. The public value ease and affordability of access, but benefit from an environment where works are created.103 Consequently, none of the interest groups value purely exclusivity or access.
The dichotomy in copyright law has functioned as a basis for copyright regulation. It was recognized in the age of enlightenment,104 by the national legal systems that have influenced modern copyright law,105 in the fundamental international instruments on copyright law106 and in EU law.107

101 Ficsor(2002), p. 500
102 Davies(2013), p. 16
103 Geiger(2010), p. 2
104 Geiger(2010), p. 3
106 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) art. 8; WCT Preamble rec. 1 and 5
107 InfoSoc rec. 31
The *balance of interests* perspective came about in part as a response to the Umbrella Solution.\(^{108}\) To a certain degree there seems to be a schism between the two approaches.\(^{109}\) The development of digital technology had a fundamental impact on the balance of interests in copyright law.\(^{110}\) The WCT and the InfoSoc-directive both looked to address this development, with a view to retain a balance of interests.\(^{111}\) Several proponents of the balance interests perspective have strongly questioned whether they achieve this aim.

They have highlighted that this system establishes broad exclusive rights that are limited by a mostly alternative list of exceptions, which has been labelled narrow and diffuse.\(^{112}\) That the exceptions are limited by the three-step test\(^{113}\) and technical protection measures, which may hinder even legitimate secondary use of digital content.\(^{114}\) The strongest statement by the proponents of this perspective was against the restrictive interpretation of the three-step test espoused by the proponents of the Umbrella Solution.\(^{115}\)

On this basis, they argue that the system of the InfoSoc-directive has disturbed the balance of interests in copyright regulation.\(^{116}\) I will address these issues further below.

There are two additional perspectives that from a legal and interests perspective can affect the level of copyright protection. In some situations these rights systems will clash with copyright and limit protection *de lege lata*. As those considerations will depend in the specifics of the case at hand, I will mostly focus on them in a *balance of interests* perspective in the following.

### 2.4.1.1 Human rights

The traditional view in legal theory has been that human rights cannot affect the substantial level of copyright protection. This was considered inherently addressed in the system of copyright law.\(^{117}\)

The European Court of Human Rights (ECtHR) dismissed this in two recent cases. The court did not find a violation of human rights in either case, but confirmed that the question must be considered on substance even in cases with no great public interest, of a commercial charac-

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\(^{108}\) Geiger et.al.(2010)

\(^{109}\) The language used in Ficsor(2012) (in particular on p. 2) is certainly striking in this regard.

\(^{110}\) COM(2016) 593 final, p. 2

\(^{111}\) WCT preamble rec. 2, 3 and 5; InfoSoc rec. 5 and 31

\(^{112}\) See InfoSoc art. 5 (1) and rec. 32; Janssens(2009), p. 332

\(^{113}\) InfoSoc art. 5 (5); Davies(2013), p. 16

\(^{114}\) InfoSoc art. 6

\(^{115}\) Geiger et.al.(2010)


\(^{117}\) Geiger and Izyumenko(2014), p. 317
ter, and in cases of widespread copyright violations. The CJEU has also utilized human rights to delineate the scope of copyright exceptions in recent practice. The human right to protection of property cover copyright, both in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union. (CFREU) It must however be balanced on basis of the proportionality test against the right to freedom of and access to expressions and other human rights. The CJEU will normally follow the practice of the ECtHR on human rights. Exactly where the limit goes for finding a violation in the level of copyright is debatable. The balancing exercise of the ECtHR is famously unsystematic. Hugenhoetz considers it unlikely that a court will find a violation where the right holder offers the work on license terms that amount to fair remuneration. Geiger considers more ambitiously human rights as an “effective tool” to remedy overprotective tendencies of copyright regulation in the digital environment to help reestablish a fair balance of interests. Human rights must also be taken into account as strong general social interests when evaluating the level of copyright protection, even in cases where there is no human rights violation. In such cases a different balance is necessary than for instance in a purely commercial relationship. Note that the ECHR only establishes a minimum level of protection, and exceptions can be made to the right to property based on the “public interest” in return for “fair remuneration”.

2.4.1.2 Competition law

The EU competition rules is an additional rule system to the freedom of movement rules that aim to achieve market integration by regulating the market behavior of undertakings. TFEU art. 101 regulate export and resale restrictions in license and distribution agreements. This

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118 Ashby Donald and others v. France; Frederik Neij and Peter Sunde Kolmisoppi v. Sweeden; Geiger and Izyumenko(2014), p. 320
119 Eva-Maria Painer v Standard VerlagsGmbH and Others. Case C-145/10; Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others Case C-201/13
120 ECHR protocol 1 art. 1; CFREU art. 17
121 ECHR art. 10; CFREU art. 11
122 Geiger(2009), p. 28-30
123 Ibid. p. 38-39
125 Hugenhoetz(2000), p. 15-16
126 Geiger(2009), p. 40
127 Geiger(2010), p. 5
128 ECHR art. 53
129 ECHR protocol 1 art. 1; CFREU art. 17
130 As well as economic efficiency and consumer welfare, Post Danmark A/S v Konkurrencerådet Case C-23/14 para. 22
includes copyright based contract clauses that prevents delivery of goods and services between Member States in the internal market. Art. 102 regulate misuse of dominant position, which can also affect copyright in cases where undertakings in a dominant position refuse license for use to a competitor.\footnote{AstraZeneca v Comission Case C-457/10 P para. 148; see in general Rognstad(2008), p. 428-429} 

The granting of an exclusive copyright based license agreement on copyright in a territory does not in itself violate art. 101. It will however be a violation if it aims to reestablish partitioning in the internal market, unless other legal or economic circumstances show the agreement is not liable to impair competition.\footnote{Joined cases C-403/08 and C-429/08 para. 137-140} 

The dominant understanding in legal theory is that the competition rules and the exhaustion principle established in the free movement rules are alternative. Their legal consequences must be added, rather than harmonized.\footnote{Rognstad(2008), p. 429-430} Therefore competition rules might limit the application of an exclusive right even if it is not exhausted. 

Rognstad has argued that the two systems should be applied in concurrence to achieve market integration.\footnote{Ibid. p. 432 ff} I will shortly address this point of view below in a \textit{balance of interests} perspective.

2.4.2 Technical equivalence

It is a generally recognized approach in EU legislation that “all laws and regulations should so far as possible, be equivalent online and offline.”\footnote{See Reed(2010), p. 249 with referenced legal sources} This amounts to the principle of technical equivalence. 

Schellekens establishes the principle as both a method and a substantive guideline to determine what rules should apply in an online context.\footnote{Koops et al (eds.), p. 56-57} 

As a method, it addresses how an equivalent offline rule can be applied on an online issue. As a substantive guideline, it states that offline and online cases that are equivalent should be dealt with equivalently. Non-equivalent cases should be treated differently only to the extent of the difference.\footnote{Ibid. p. 56-57}

The aim is to achieve the same level of protection and the same consequences of the regulation of an offline act as an online act. In cases where the consequences of the application of an offline rule in an online context are different, a different rule might have to be applied to achieve the same result.\footnote{Ibid. p. 57}
Reed outlines a “tentative methodology” to the issue. You must identify the interests the rule means to take into account, analyze how the rule is likely to affect those interests and evaluate whether the balance of interests is equivalent to the offline situation.\textsuperscript{139} The principle is considered primarily directed to the legislator. Schellenkens states that the principle can be used by the courts, but qualifies that it cannot be used to disregard technology specific regulation adopted by the legislator.\textsuperscript{140} In my opinion, this cannot rule out the application of the principle where a court must choose between applicable legal bases. In such a situation, a court must be able to use the principle to ascertain the most fitting legal basis.\textsuperscript{141} The principle of technical equivalence is of interest, as the CJEU seem to have relied on some version of it in the cases I will address below.

\textsuperscript{139} Reed(2010), p. 256 ff  
\textsuperscript{140} Koops et al (eds.), p. 73  
\textsuperscript{141} Arguably, the CJEU did exactly this in C-174/15. The court sees itself precluded from such considerations on rental, para. 34 and 35, but not for lending, para. 54. See also part. 4.
3 The exclusive right of distribution and the exhaustion principle in the digital context

3.1 Introduction

The right to control the distribution of a copyright protected work is one of the exclusive rights to dissemination of the copyright holder. Distribution is the right control the transfer of ownership of an original or copy of a copyright protected work, whether by sale or otherwise.\(^{142}\) A sale is a transfer of ownership in return for payment.\(^{143}\) Distribution entails a commercial relationship, whether between undertakings, consumers or private persons.

The distribution right is in an internal relationship with the exhaustion principle, a copyright exception that applies specifically to the distribution right. The most generally applicable definition of exhaustion in EU law states that exhaustion applies at “the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent”.\(^{144}\) The exhaustion principle limits the exclusive distribution right to the first act of distribution. This means the distribution right will effectively apply to the first act of distribution of an original or copy of a copyright protected work.

Exhaustion applies to the original and copy of the copyright protected work in question, not the copyright protected work itself.\(^{145}\) Exhaustion in the EU is regional and only applies to transfers of ownership in the EEA area.\(^{146}\)

There are different rationales for the exhaustion principle. In the EU the market integration rationale has been central. As mentioned, the exhaustion principle was established in EU law based on the free movement of goods rules in Deutsche Grammophon.\(^{147}\)

The case dealt with the parallel import of gramophone records from France and their subsequent sale in Germany. The referring court in essence asked whether the distribution right could “prevent the marketing on national territory of products lawfully distributed by such manufacturer or with his consent on the territory of another member state”.\(^{148}\)

The court determined that the distribution right amounted to a restriction to the freedom of movement of goods in the internal market. A restriction can be justified under the TFEU art. 36 derogation, but copyright protection can only restrict free movement as far as it protects

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\(^{142}\) InfoSoc art. 4 (1); Peek & Cloppenburg KG v Cassina SpA. Case C-456/06 para. 36

\(^{143}\) C-128/11 para. 42

\(^{144}\) InfoSoc art. 4 (2)

\(^{145}\) Von Lewinski and Walter(ed.)(2010), p. 997

\(^{146}\) e.g. InfoSoc art. 4 (2); Von Lewinski and Walter(ed.)(2010), p. 1007

\(^{147}\) Case C-78/70

\(^{148}\) C-78/70 para. 4
the “specific subject matter” of the right. In the case of distribution, this only extended to the first sale, wherever in the internal market. The opposite conclusion “would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market”, and might lead to “partitioning of the market”.

The remuneration rationale has been another prominent argument for exhaustion. The idea is that the copyright holder receives remuneration corresponding to the intellectual effort and achievement in the specific original or copy of the copyright protected work by the first sale or other transfer of ownership. To extend protection beyond this would go beyond the value of the creative effort and conflict with the public interest in clarity in the ownership of a specific copy of a work.

In addition, competition policy considerations speak for not allowing a copyright holder to control competition among distributors. Cultural promotion considerations can also speak for limiting the ability of a copyright holder to control the distribution of a copy beyond the first transfer of ownership.

WCT art. 6 (1) establishes a general distribution right international law, and art. 6 (2) leaves the implementation of the exhaustion principle up to the signatory states. The WCT was implemented at EU level in the InfoSoc-directive. Its Agreed Statement specifically rules out the application of the distribution right digitally. The Umbrella Solution does leave the signatories of the WCT free to classify their exclusive rights as they wish, but the level of protection of the treaty must be maintained and exhaustion should specifically not apply digitally.

The UsedSoft-judgment directly challenges this starting point. In the following, I will address the impact of the UsedSoft-judgment on the application of the distribution right as established in the Software Directive and InfoSoc-directive in the digital context.

149 C-78/70 para. 11
150 C-78/70 para. 12
151 C-78/70 para. 7
153 Rognstad(2009), p. 160-161
154 InfoSoc rec. 15
155 WCT Agreed Statement Concerning art. 6 and 7
156 Ficsor(2002), p. 208-209; see above part 2.2.1
3.2 The Software Directive (2009/24/EC)

3.2.1 Introduction

The Software Directive was first enacted in 1991 as the first measure of EU secondary regulation on copyright.\(^{157}\) It was codified, where the original directive and all later amendments are collected in a new directive,\(^ {158}\) in 2009 without substantial changes.\(^ {159}\) The Software Directive requires Member States to “protect computer programs, by copyright, as literary works within the meaning of the Berne Convention”.\(^ {160}\) The Software Directive does not define the term computer programs. This was done for fear of falling foul of rapid technological developments.\(^ {161}\) The Explanatory Memorandum to the 1991 directive defines computer programs as "a set of instructions the purpose of which is to cause an information processing device".\(^ {162}\) The protection of the directive extends to “any form of a computer program”.\(^ {163}\) This is seen to cover the computer program as source code, object code and assembly code and in whatever embodiment.\(^ {164}\) Source code is the computer program written by a human in programming language. Object code is the source code in machine language understandable and executable by a computer. Assembly code is a human-readable version of the of the object code.\(^ {165}\) Preparatory design materials are covered if it is “such that a computer program can result from it at a later stage.”\(^ {166}\) The directive does not extend to the functionality, programming language and graphic user interfaces.\(^ {167}\) They might however be protected by the InfoSoc-directive.\(^ {168}\) The dissemination of a computer programs is to a degree different to other types of works. A computer program must be applied digitally in a computer, whether you the program comes from a physical carrier or download.\(^ {169}\) The Software Directive also depart from the usual

\(^{157}\) Directive on the legal protection of computer programs 91/250/EEC
\(^{158}\) European Commission Legal Service(2013)
\(^{160}\) Software Directive art. 1 (1)
\(^{161}\) Von Lewinski and Walter(ed.)(2010), p. 99
\(^{162}\) COM(88) 816 final p. 6
\(^{163}\) Software Directive art. 1 (2); Software Directive rec. 7
\(^{164}\) Dreier and Hugenholtz(2016), p. 244
\(^{165}\) LINFO(2005)
\(^{166}\) Software Directive art. 1 (1); Software Directive rec. 7
\(^{167}\) Software Directive art. 2 (2)
\(^{168}\) Dreier and Hugenholtz(2016), p. 244
\(^{169}\) Rognstad(2003), p. 457
approach of EU copyright law in the presumption that copyright passes from an employee to the employer in work relationships.\textsuperscript{170} The Software Directive is therefore arguably less author-centric than EU copyright in general.

3.2.2 The legal basis: The exclusive right to distribution of computer programs

Software Directive art. 4 (1) c establish the exclusive rights to control the distribution of “the original computer program or copies thereof”\textsuperscript{171}:

“1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:
[..]
(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.”\textsuperscript{172}

The Software Directive establishes a broad distribution right, which also covers the right to rental.\textsuperscript{173} Art. 4 (2) establishes exhaustion as an exception to the right of distribution at first sale established in art. 4 (1) c:

“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.”\textsuperscript{174}

The use of the term “first sale” in art. 4 (1) c limits the application of exhaustion with regard to computer programs from other transfers of ownership than distribution by “sale”. A transfer of ownership in return for payment.\textsuperscript{175}

3.2.3 UsedSoft GmbH v Oracle International Corp (C-128/11)

The CJEU dealt with the application of the distribution right and exhaustion principle on acts of digital dissemination that shared the central characteristics of an act of distribution in UsedSoft. (C-128/11)

\textsuperscript{170} Software Directive art. 2 (3)
\textsuperscript{171} Software Directive art. 4 (1) c
\textsuperscript{172} Software Directive art. 4 (1) c
\textsuperscript{173} See also Rental and Lending Directive art. 4
\textsuperscript{174} Software Directive art. 4 (2)
\textsuperscript{175} C-128/11 para. 42
UsedSoft GmbH is a marketer of used software.176 Their business model involves buying used software licenses, and offering them at a lower price than those disseminate it with authorization from the copyright holder.

The legal dispute arose from a 2005 promotional campaign where UsedSoft offered used licenses to computer programs to which Oracle held the copyright. At the time, Oracle 85 % downloads from the internet and only 15 % on a physical carrier like CD-ROM or DVD. The program, a “client-server-software” program, was offered free for downloaded to the acquirer’s computer. A license agreement granted the right to store the copy permanently on a server and allow 25 users per license to download it to their local workstations.

The license agreement read as follows:

“With the payment for services you receive, exclusively for your internal business purposes, for an unlimited period a non-exclusive non-transferable user right free of charge for everything that Oracle develops and makes available to you on the basis of this agreement.”177

A maintenance agreement additionally allowed updated and corrected versions of the program to be downloaded.

UsedSoft redistributed used licenses to the Oracle program. They asked the secondary acquirers to download the program from Oracle’s website and use it with on the legal basis of the license agreement. Acquirers who were buying additional licenses and already had a copy were asked to reproduce this copy and rely on the used license agreement in the same way Oracle sued UsedSoft in Germany, demanding that they cease the distribution of their copyright protected computer programs. Oracle claimed they did not sell their programs, but simply granted the acquirer a user right. Even if the act of dissemination of the program did amount to a sale, exhaustion would not apply as it only applies to tangible copies of copyright protected works.

The Regional Court of Munich I and on appeal the Higher Regional Court Munich decided the case in Oracle’s favor. UsedSoft appealed the case to the German Federal Court of Justice, who referred three questions to the CJEU for a preliminary ruling.178

176 The company’s website can be accessed at: https://www.usedsoft.com/en [accessed on 2.4.2018]
177 C-128/11 para. 23
178 Treatment based on the summary of the case facts in C-128/11 rec. 20-27
3.2.3.1 Question 2: The application of the distribution right and the exhaustion principle on the digital context after the Software Directive

The court considered that the second referred question should be addressed first. The second question dealt with the central issue of the judgment, the applicability of the distribution right and the exhaustion principle to acts of digital dissemination. The court understood the referring court to ask:

“[W]hether and under what conditions the downloading from the internet of a copy of a computer program, authorised by the copyright holder, can give rise to exhaustion of the right of distribution of that copy in the European Union within the meaning of Article 4(2) of Directive 2009/24.”

The court concluded the question in the affirmative, stating

“Article 4(2) of Directive 2009/24 must be interpreted as meaning that 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.”

In short, exhaustion in the sense of Software Directive art. 4 (2) will apply to a digital act of distribution at: the downloaded of a copy of the computer program with authorization of the copyright holder, even when the download is free of charge; the conclusion of a time unlimited license to use the copy in question; for remuneration corresponding to the value of the copy in question. These circumstances together make up an act of distribution, which gives rise to the exhaustion of the distribution right.

The court also demand that the copy on the hand of the disseminator had to be rendered unusable at the time of the resale. This distinction can be called the forward and delete criteria. This effectively extends the constraints on the physical process of exhaustion to the digital process. The court also pointed out that license packages including several licenses could not be broken up and sold separately, as exhaustion applies to the copy and not the license per se.

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179 C-128/11 para. 35
180 C-128/11 para. 72
181 C-128/11 para. 70
182 See to that effect United States Copyright Office(2001), Section III B 1a
183 C-128/11 para. 72
It is important to note the interpretative solution here is generally applicable. As long as an act of digital dissemination share the characteristics established by the court the exhaustion principle must apply.

3.2.3.2 Four issues that merited particular attention

In reaching its conclusion to question two, the court addressed four points. I will address them in the following order: point two on the application of the distribution right or the communication right; point three on the application of the distribution right on digital dissemination; point one on the definition of the term sale; finally, point four on the impact the maintenance agreement on exhaustion.

The second point the court addressed was whether the act of dissemination in question had to be classified as an act of making available to the public in the sense of InfoSoc art. 3, as Oracle and the Commission argued. An act that expressly does not give rise to exhaustion. This was essentially a question of choosing the applicable legal basis.

The CJEU dismissed the argument, stating the Software Directive is *lex specialis* in relationship to the InfoSoc-directive. The court found support for that interpretation in InfoSoc art. 1 (2) a. The article makes it clear that the InfoSoc-directive enacted in 2001 “shall in no way affect existing Community provisions relating to […] the legal protection of computer programs”. This refers to the 2009 Software Directive, which, as stated above, is merely a codification of the 1991 Software Directive without changes in substance.

The provision in question is a so-called “safeguard clause”. EU law does not operate with a clear *lex posterior*-principle. Primacy between equal acts of EU legislation is therefore normally decided on a *lex specialis*-basis. Such clauses clarifying the internal relationship of legal acts are therefore not unusual.

The intention of the EU legislature based on the safeguard clause in InfoSoc seems clear. In cases regarding computer programs, the Software Directive is more specialized and it should apply. It could be argued that the InfoSoc-directive was enacted specifically to address digital dissemination. Whether that makes the act more specialized than one directly addressing computer programs is debatable. Such arguments can however not be given weight against the clear statement of intent by the EU legislature.

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184 C-128/11 para. 50
185 C-128/11 para. 51
186 Von Lewinski and Walter(ed.)(2010), p. 953
In light of that conclusion, the central question became whether the distribution right and the exhaustion principle could apply to an act of digital dissemination. The CJEU dealt with this in point three.

Oracle, the governments of the Member State that had offered submission to the court and the Commission argued that distribution right and the exhaustion principle of the Software Directive could not apply to the acts of digital dissemination. They only applied to the dissemination of physical copies of copyright protected works.187 In support of this argument, they referred to the wording of Software Directive art. 4 (2), InfoSoc recital 28 and 29 and InfoSoc art. 4 read in conjunction with WCT art. 8 and the WCT Agreed Statement Concerning art.6 and 7.188 The Commission specifically argued “recital 29 in the preamble to Directive 2001/29 confirms that ‘[t]he question of exhaustion does not arise in the case of services and on-line services in particular’.”189

The CJEU concluded to the contrary, stating that exhaustion of the distribution right concerned “both tangible and intangible copies of a computer program”, including “copies of programs which, on the occasion of their first sale, have been downloaded from the internet onto the first acquirer’s computer.”190

Addressing the wording of art. 4 (2), the court stated that it did not find the term “sale […] of a copy of the program” to make any distinction with regard to the tangible or intangible nature of a copy of a computer program.191 On the context of the Software Directive as a whole, the court noted the recitals and provisions of the Software Directive make it clear that the directive applies to computer programs “in any form”.192

The court did not accept the application of the InfoSoc-directive, relying on its previous conclusion that the Software Directive is lex specialis.193 Addressing the InfoSoc-directive as a contextual source of interpretation, the court states that equal provisions in the same field of law shall normally be interpreted the same. However, the clear intention stated by the EU legislator that the Software Directive should cover computer programs “in any form” meant a contrary interpretation of the InfoSoc-directive could not affect the interpretation of the Software Directive. Additionally, the court was not necessarily prepared to accept such an interpretation of the InfoSoc-directive.194

187 C-128/11 para. 53
188 C-128/11 para. 53
189 C-128/11 para. 54
190 C-128/11 para. 58
191 C-128/11 para 55
192 Software Directive rec. 7 and art. 1 (2); C-128/11 para 57
193 C-128/11 para 56
194 C-128/11 para 60
In addition, the court relied on “the principle of equal treatment”. The court noted that the acts of digital and physical delivery were economically similar. The court further found the act of dissemination by online-transmissions are the “functional equivalent” to the physical act of dissemination. The court argued that this meant that exhaustion must apply to the act of dissemination whether it relates to “a tangible or an intangible copy of the program”.\footnote{C-128/11 para 61}

This seems a clear reference to the principle of technical equivalence, which states that online and offline cases that are equivalent should be treated equally in legal terms, and if different, they shall only be dealt with differently to the degree of their dissimilarity.\footnote{Koops et al (eds.), p. 56}

Further, the court referred to the objective of the exhaustion principle, to avoid “partitioning of markets”, by limiting the scope of the distribution right to “what is necessary to safeguard the specific subject matter of the intellectual property concerned”.\footnote{C-128/11 para 62}

According to the court, the specific subject matter of the distribution right to a copy of a copyright protected work is its first sale. The first sale allows the right holder to achieve appropriate remuneration for the copy in question. The control of further resales of a copy and demand remuneration for each resale goes beyond its specific subject matter.\footnote{C-128/11 para 63}

The wording used by the court here is important. When evaluating the scope of the exhaustion principle the court uses the terms “partitioning markets” and “specific subject matter”. These formulations are from the definition of the exhaustion principle as established in Deutsche Grammophon.\footnote{C-78/70} The judgment established the exhaustion principle as an internal market wide copyright exception based the primary EU law regulation on freedom of movement of goods. This shows that when the CJEU delineates the scope of the exhaustion principle in UsedSoft it is on the basis of by EU primary law and the free movement of goods rules. Any protection beyond the specific subject matter or first sale would consequently be a restriction on the free movement in the internal market, which could not be justified under the free movement rules.

The court is as such employing a teleological interpretation by based on the objectives of the exhaustion principle, specifically in contexts of the basic objectives of the internal market.

The first point of importance addressed by the court was whether the digital act of dissemination constituted a “first sale […] of a copy of a program” in the sense of Software Directive art. 4 (2) which gives rise to exhaustion.\footnote{C-128/11 para 38}
The court first determined that sale is an autonomous concept of EU law. An autonomous concept of EU law is a legal concept that makes no reference to the legislation of the member states. It is settled in the case law that such concepts must be given uniform interpretation throughout the EU legal system.\textsuperscript{201}

The court defined a “sale”, relying on “a commonly accepted definition”, as “an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.”\textsuperscript{202} In short, a sale must involve a transfer of ownership in a copy of a copyright protected work in return for payment. This definition of the term “sale” must be considered to extend to all EU copyright law.\textsuperscript{203}

The definition was of particular importance in the UsedSoft-judgment as the dissemination process and contractual relationship in question were highly complex. The copyright holder, Oracle, allowed free downloads of the program in question from their website. The use of the program required the signing of a license agreement, which for a fee gave the user a “non-exclusive, non-transferable user right” for an unlimited period.\textsuperscript{204} This amounts to a proprietary software license. It grants a user right to a copy, but retains ownership. It is a recognized method of disseminating computer programs.\textsuperscript{205}

Oracle claimed it only granted a user right, which did not amount to a sale.\textsuperscript{206} The court concluded that the act of dissemination seen as a whole constituted “a ‘first sale … of a copy of a program’ within the meaning of Article 4(2) of Directive 2009/24.”\textsuperscript{207} Oracle had made a copy available for download and granted a time unlimited user to the copy in right in return for a fee.

In reaching the conclusion, the court relied on a teleological interpretation through \textit{effet utile}. If an act of dissemination had the qualities of a sale, all a right holder would need to do was rename the contract for a license to avoid exhaustion.\textsuperscript{208} This would have the effect of undermining the effectiveness of the exhaustion principle and “divest it of all scope.”\textsuperscript{209}

The fourth and final point addressed dealt with the maintenance agreement. Whether patches and updates to the digital copy of the computer program with basis in the maintenance agree-
ment meant that it no longer corresponded to the copy distributed meaning exhaustion based on Software Directive art. 4 (2) would not apply. This was a comparatively minor point. The court determined that the right to the maintenance agreement itself was not exhausted. The maintenance agreement was a contract for services separable from the copy itself. It relied on the wording of art. 4 (2), stating that it applied to copies of copyright protected works that had been “subject of a first sale” and not “contracts for services […] separable from such a sale”.

On the other hand, the court concluded exhaustion applies to the copy as patched and updated. This because the patches and updates become integral parts of the copy already downloaded, remaining with the acquirer even if the license agreement itself expires.

3.2.4 Evaluating the court’s interpretation in Usedsoft

In a reading of the court’s interpretation only in the context of the Software Directive, the court’s interpretation seems of general good merit. The court also relies prominently on a lex specialis consideration, which keeps its interpretation separate from the general context of the InfoSoc-directive. In this regard, the wording and context of the Software Directive are prominent arguments for the court in its conclusion.

Rognstad has criticized what he sees as a false equivalence in the courts interpretation. He points out that the court does not address the scope of the distribution right. He considers that the distribution right as understood in the InfoSoc-directive and the WCT only applies to the distribution of physical copies, and that all acts of digital dissemination must be considered acts of communication to the public.

This relies on the view that the CJEU established a perfect correlation between the distribution right in Peek & Cloppenburg, which he considers as an underlying assumption in the UsedSoft-judgment. As the exhaustion principle cannot extend beyond the distribution right and the distribution right cannot extend to digital dissemination the conclusion of the court is not sustainable.

This leads him to state that the court’s interpretation in UsedSoft is built on “unconvincing legal premises”.

210 C-128/11 para. 64
211 C-128/11 para. 66
212 C-128/11 para. 67
213 Rognstad(2014), p. 9
214 C-456/06
215 Rognstad(2014), p. 18
216 Rognstad(2014), p. 9
217 Rognstad(2014), p. 18
It is true that both the wording and context of the InfoSoc-directive differ from the Software Directive. To the degree the concepts in the two judgments are considered equivalent questions could be asked about the court’s reasoning, albeit in view of the fact that the Software Directive is clearly *lex specialis*. I will address the InfoSoc-directive further below.

The treatment on the relationship with the WCT is arguably the largest weakness of the judgment. The statement by the court to the effect that a transfer of ownership changes an act of making available into an act of distribution is in clear contradiction of the WCT Agreed Statement, which distinctly ties the distribution right to physical copies.\(^{218}\)

Additionally, the use of the concept of technical equivalence by the court has come under some criticism. For instance, the fact that the court does not raise considerations like the claim for perfect second hand copies.\(^{219}\) The danger of piracy also receives a short treatment. While it is far from sure these consideration would have had a substantial impact on the court’s conclusion, it is nonetheless striking that they are not explicitly dealt with.

Despite the criticism mentioned above, I am of the view that the judgment can both be explained and legally justified. I believe the central aspect to grasp about the judgment is that it prominently relies on teleology and primary law considerations. When the court limits the exclusive right to distribution, it is not on the basis of the exhaustion the formalistically delineated exhaustion principle of the WCT in the InfoSoc-directive. Rather the terms used by the court to substantiate the exhaustion principle are taken straight from old CJEU case law, which established exhaustion on the basis of the freedom of movement rules.

The freedom of movement rules are a central part of the constitutional basis of the EU. As established above the international obligations of the Union can only be given effect as long as they do not call into question the basic constitutional principles of the EU legal order.\(^{220}\) It is therefore arguable that the court’s conclusion in UsedSoft would have to be upheld even if it was in violation of the WCT.\(^{221}\) I however also question if the application of the exhaustion principle of the court actually does violate the WCT. Rognstad argues that the interpretation of the court can be justified on basis of the freedom of movement rules.\(^{222}\)

I believe on basis of the treatment above that the CJEU is relying on exhaustion principle as an expression of the free movement rules, as it formulates the principle on this basis. The exception established for digital dissemination can be justified in relation to the WCT as an exception from the making available right based on the three-step test.\(^{223}\)

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218 WCT Agreed Statement Concerning art. 6 and 7
219 Rognstad(2014), p. 16-17
220 Lenaerts and Gutiérez-Fons(2013), p. 29
221 Although debatable, see Geiger(2009), p. 39
222 Rognstad(2014), p. 12-16
223 WCT art. 8 and 10; Rognstad(2014), p. 10
makes it clear that the signatories can choose how they structure their system of exclusive rights.\textsuperscript{224}

Whether you classify the act in question as the delivery of goods or services is, as Rognstad admits, debatable.\textsuperscript{225} The central point to grasp is that the court departs from any formalistic view that the free movement of goods and services and therefore exhaustion should be delineated on basis of the physical or digital nature of the copy disseminated.

In my opinion, this amounts to a workable theory for understanding, legally explaining and justifying the interpretation of the CJEU in the UsedSoft-judgment. I admit however that it is debatable to what degree the above is rationalization.

3.3 The InfoSoc Directive (2001/29/EC)

3.3.1 Introduction

The adaption of the InfoSoc-directive was a reaction to the development in digital technology. It aimed to address the new, global and quickly growing communication networks and structures of “the information society”.\textsuperscript{226} It fulfilled the international obligations of the EU by implementing the central provisions of the WCT as EU law.\textsuperscript{227} The directive harmonizes the reproduction right, the communication right, rules on technical protection measure and digital rights management, the distribution right and exhaustion principle, as well as exceptions from the reproduction right and communication right.\textsuperscript{228} The InfoSoc-directive is general in application and horizontal in its harmonization of copyright.\textsuperscript{229} Most legislative efforts by the EU on copyright take sectoral approach or address a specific issue, like for instance the Software Directive. Therefore, all issues of copyright law that are not covered by sectoral or specialized legislation will in principle fall under the scope of the InfoSoc-directive. This applies to most acts of digital dissemination. The InfoSoc-directive enshrines a high level of protection.\textsuperscript{230} That any exceptions from rights must be interpreted narrowly has become a mantra of the CJEU in cases dealing with the directive, and the court has been stated as its principal purpose.\textsuperscript{231} In newer practice, the court has however recognized that the level of protection must allow for the effectiveness of excep-

\textsuperscript{224} As recognized by Rognstad(2014), p. 5
\textsuperscript{225} Rognstad(2014), p. 15
\textsuperscript{226} Von Lewinski and Walter(ed.)(2010), p. 937-938
\textsuperscript{227} InfoSoc rec. 15; Von Lewinski and Walter(ed.)(2010), p. 945-946
\textsuperscript{228} COM(1997) 628 pp. 8, 28
\textsuperscript{229} Kur and Dreier(2013), p. 270
\textsuperscript{230} InfoSoc rec. 9-11; C-5/08 para. 40
\textsuperscript{231} C-145/10 para. 107
tions in line with their object and purpose.\textsuperscript{232} It should constitute a fair balance of interests to access and protection\textsuperscript{233} and not prejudice fundamental rights, like freedom of expression.\textsuperscript{234}

3.3.2 The legal basis: The exclusive right to distribution in the InfoSoc-directive

The exclusive right of the copyright holder to control the distribution of his copyrighted work is set out in InfoSc art. 4 (1):

“Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.”

The primary exception from the exclusive right to distribution, the distribution right’s exhaustion, is set out in art. 4 (2):

“The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.”

The InfoSoc-directive applies exhaustion in the event, and only in the event,\textsuperscript{235} of either “the first sale or other transfer of ownership”. This is in contrast to the Software Directive, which limit exhaustion of the distribution right to the “first sale”.\textsuperscript{236}

3.3.3 CJEU practice on digital distribution and exhaustion in InfoSoc

The CJEU has not directly addressed the question of digital exhaustion in the InfoSoc-directive. It has however made statements in several judgments that to some degree address the issue. A recent reference for a preliminary ruling from the Netherlands means that the issue will be dealt with in the not too distant future.\textsuperscript{237}

\textsuperscript{232} C-145/10 para. 133
\textsuperscript{233} InfoSoc rec. 31; C-201/13 para. 26
\textsuperscript{234} C-201/13 para. 27
\textsuperscript{235} C-456/06 para. 36
\textsuperscript{236} Software Directive art. 4 (2)
\textsuperscript{237} IPKat(2018)
3.3.3.1 The UsedSoft (C-128/11) obiter dictum

The UsedSoft-judgement dealt with digital distribution and exhaustion in the context of the Software Directive, which is *lex specialis* to the InfoSoc-directive. The court did however also make a short statement on the possibility that digital distribution in the InfoSoc-directive could apply in a similar context as in the judgment. The court stated that the wording of art. 6 of the WCT, which the InfoSoc-directive implements in EU law, makes it clear that the distribution right covers “the making available to the public of the original and copies of their works through sale or other transfer of ownership.” In the opinion of the court, this means that the existence of a transfer of ownership changes “an act of communication to the public provided for in Article 3 of [the InfoSoc-directive] into an act of distribution referred to in Article 4”. The court based its conclusion on the Opinion of the Advocate General who had made the same argument.

3.3.3.2 Art & Allposter (C-419/13)

A second case often referenced in discussions on the applicability of the distribution right and exhaustion principle of the InfoSoc-directive is the Art & Allposter-judgment. The judgement dealt with the application of the exhaustion principle on a physical copy that had undergone an alteration from one physical medium to another. Allposter was a marketer of works by famous painters on posters or canvas. It used the chemical method “canvas transfer” to transfer pictures “from a paper poster to a painter’s canvas” and then sold the images on the “new medium.” Pictotright, a copyright collective society in the Netherlands who administrated the copyright to some of the images on the posters, took Allposter to court. They claimed the method used by Allposter to reproduce the works in different forms went beyond the exhaustion of the distribution right. Resale of the canvas version required additional consent from the copyright holder. The parties agreed that the distribution right to the original poster was exhausted. They disagreed on whether exhaustion applied to the specific copy or the immaterial work enshrined in it.

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238 C-128/11 para 50 and 51
239 C-128/11 para 52
240 Advocate General Opinion on C-128/11 para. 73
241 See for instance Prop 104 L p. 124
242 Art & Allposters International BV v Stichting Pictoright Case C-419/13
243 C-419/13 para. 23
244 C-419/13 para. 2
245 C-419/13 para. 14-21
246 C-419/13 para 32
247 C-419/13 para 33
The court addressed the scope of the distribution right in InfoSoc art 4 (1) and the exhaustion principle in art. 4 (2). It noted that the wording of art. 4 (2) refer to the “first sale or other transfer of ownership” of ‘that object’, and that rec. 28 states the distribution right is “the exclusive right to control distribution of the work incorporated in a tangible article.” The court therefore considered it the intention of the EU legislature that the distribution right should apply to “each tangible object”. The court found further support for its conclusion in the WCT Agreed Statement Concerning art. 6 and 7.

In its conclusion, the CJEU states that the exhaustion of the distribution right applies to “the tangible object into which a protected work or its copy is incorporated”. This followed the conclusion of the Advocate General. Exhaustion did accordingly not extend to the author’s own intellectual creation, and consequently not to a copy that has undergone a change in medium.

3.3.3.3 Vereniging Openbare Bibliotheken (C-174/15)
The Vereniging Openbare Bibliotheken-judgement dealt with whether the lending right of the Rental and Lending Directive could cover digital acts of dissemination that share the central characteristics of an act of lending. The fourth questions referred directly asked whether digital exhaustion was possible in the context of the InfoSoc-directive. The court did not answer the question, but referred to its positive answer to question two. Question two asked the court whether the lending of a copy of an ebook by a library could be made contingent on the copy having been subject to a first sale transfer of ownership for the purpose of Infosoc art. 4 (2). The court answered the question in the positive. As the court referred to its answer in question two in its refusal to answer question four, you could ask if the positive answer to question two is not also a positive answer to question four. Interpreted that way the courts answer has in effect accepted that the distribution right and exhaustion as defined in the InfoSoc-directive can apply also to digital copies. This is a complete departure from the Umbrella Solution.

248 C-419/13 para 27 and 28
249 C-419/13 para. 37
250 C-419/13 para 39
251 C-419/13 para. 40
252 Advocate General Opinion on C-419/13 para. 67 and 68
253 C-419/13 para. 49
254 On this judgment, see the in-depth treatment in part 4.2.2
255 C-174/15 para. 26 (4)
256 C-174/15 para. 73
257 C-174/15 para. 55
258 C-174/15 para. 66
3.3.3.4 Relevance of the referred practice

The CJEU does not operate with a strict concept of *obiter dictum*. In CILFIT the CJEU stated that national courts can rely on the courts practice on the relevant point of law in a previous judgement, “irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.” In that context, I think it is helpful to say a few words about the relevance of each of the judgements.

The *obiter dictum* in the UsedSoft-judgment does not relate to the substantive conclusion of the court. It is further questionable in view of the Umbrella Solution and the distribution right interpreted in light of the Agreed Statement to art. 6 and 7 of the WCT. The logic of the court is however persuasive. If an act of digital dissemination effectively includes a transfer of ownership and the central characteristics of a physical act of dissemination, it is hard to argue on merit that the copyright holder should retain the right to further transfers of ownership. The statement does however lack both depth and clarity.

The Art & Allposter-judgment dealt exclusively with the application of exhaustion on the tangible copy into which the work is incorporated. The court also relied on economic considerations. A central argument for the court was that the modification added economic value to the tangible copy of the first acquirer.

Ultimately, the substantive consequence of the conclusion of the court was that exhaustion does not extend to a copy of a work that has undergone an alteration in medium. Whether the work is tangible or intangible is arguably completely arbitrary to that conclusion. If you remove the demand for the tangible nature it would not change the substantive part of the conclusion of the court.

Therefore it is hard to argue that the judgement makes any normative consideration of the issue of digital exhaustion in the InfoSoc-directive. The court does however interpret many of the same sources of law that would be part of such an interpretation. The judgment might therefore be a good analogy to show how the court might argue in a corresponding case.

The Vereniging Openbare Bibliotheken-judgement interestingly seems to accept the concept and applicability of digital distribution and exhaustion. If a digital copy of a copyright protected work can undergo a transfer of ownership, then it as a consequence can be both distributed and subject to exhaustion. It is however important to remember that the CJEU allowed the application as a prerequisite for public lending, specifically to “improve the protection of

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259 Jacob(2014), p. 80-82
260 C-283/81 para 14
261 See this view also reflected in Griffiths(2016) p. 78
authors’ rights”. It can be questioned whether it would reach the same conclusion if it was specifically considering digital exhaustion. While the connection between question two and four is certainly interesting, it is hard to conclude that the CJEU has established a digital exhaustion for the InfoSoc-directive solely on that basis.

This leads me to two general conclusions. First, the CJEU have made statements that seem to address digital distribution and exhaustion and these statements cannot strictly be considered obiter dictum. It has however not done so in a consistent manner. While the court seems positive to the idea in UsedSoft and Vereniging Openbare Bibliotheken, it seems negative to the idea in Art. & Allposter. Second, none of the three cases expressly deals with “the point of law in question”, as outlined in CILFIT. The one that comes closest is the analysis and conclusion of the CJEU in Vereniging Openbare Bibliotheken, but as shown above it avoided directly answering the question.

3.3.4 An interpretative approach to the application of the distribution in the InfoSoc-directive

On basis of the above I find it clear that CJEU has reached a normative conclusion on the possibility of digital distribution and exhaustion in the InfoSoc-directive. I will therefore employ an interpretative perspective based on the method of the CJEU outlined above in part 1.3.4.

3.3.4.1 Textual interpretation

The text of a provision EU legislation is the first and primary source of interpretation in interpreting EU law. Both the InfoSoc art. 4 (1) and 4 (2) speak of the distribution right and the exhaustion principle of “original” or “copies” of copyright protected works. This wording is effectively the same as that of the Software Directive. This wording has traditionally been seen to refer to a work fixed in a physical medium. On the other hand, the CJEU in UsedSoft saw no demand in the equivalent phrase in the Software Directive for a physical or digital medium. As established above there is a concept of digital copies in EU copyright law. It is therefore hard to argue that this wording makes a strong distinction in itself.

262 C-174/15 para. 61, 63 and 64
263 Lenaerts and Gutiérez-Fons(2013), p. 6
264 Software Directive art. 4 (1) c and 4 (2)
265 Reinbothe and Von Lewinski(ed.)(2015), p. 111
266 C-128/11 para. 55
The exhaustion principle further applies to “that object”. The equivalent provisions of the Software Directive do not contain this phrase, which means it was not directly addressed by the CJEU in the UsedSoft-judgement. A general definition of an object is “anything that is visible or tangible, and is relatively stable in form.” At the same time “object” in the sense of digital technology can refer to “any item that can be individually selected or manipulated, as a picture, data file, or piece of text.” A data file that amounts to a work and merits protection by copyright is as such a digital copy and can be referred to as an object.

The wording of the InfoSoc-directive gives a clearer sense that it would only cover physical copies of copyright protected works than the equivalent provisions in the Software Directive. I do however not think the wording of InfoSoc art. 4 is sufficiently clear and precise, as demanded by EU law, to preclude or demand a specific interpretation. Other sources of interpretation should therefore also be taken into account.

3.3.4.2 The context of the directive: InfoSoc rec 28 and rec. 29 and art. 3

Contextual sources of interpretation are the context of a directive as a whole, EU copyright law and the preparatory works.

I see two bases contextual interpretation in the InfoSoc-directive: The application of the distribution right and the inner relationship between the communication right and the distribution right in art. 3 and 4.

InfoSoc recital 28 connects the distribution right of art. 4, and as such the terms “original”, “copies” and “object”, to “the work incorporated in a tangible article.” The recital shows the intention of the EU legislature for the application of the distribution right. Recital 28 is a strong argument against applying the distribution right of the InfoSoc-directive to digital copies and digital dissemination.

It is also interesting to the different expressed intention from the Software Directive in this regard, which states it applies to computer programs in “in any form”. InfoSoc recital 29 limits the application of the exhaustion principle from “services and on-line services in particular.” The recital addresses the relationship between art. 3 and 4 of the directive. Art. 3 applies to cases of online services, and this right is expressly not exhausted by
the provision of such a service.\textsuperscript{273} The recital seems to support the general view that all online dissemination is delivery as a service. That is as shown above not a straightforward question. For instance, in UsedSoft the CJEU concluded that acts of online dissemination which share the central characteristics of an act of distribution has to be considered covered by that right, and give rise to exhaustion. This seems in line with the view of Wiebe, that there is an intermediate category between physical dissemination and digital dissemination as a service.\textsuperscript{274} In that light, you can question whether the specification that the communication right covers online services actually tells you all that much with regard to which rights applies in the digital context. In general, the internal context of the InfoSoc-directive and in particular rec. 28 supports the view that the distribution right and exhaustion principle of that directive cannot apply to acts of digital dissemination.

3.3.4.3 The context of EU copyright law

It is an established principle of EU law that the same provisions must in principle be interpreted equally throughout an area of EU secondary law.\textsuperscript{275} The principle is not absolute. Where there is clearly a “different intention expressed by the European Union legislature in the specific context of that directive”, the same provisions might have to be interpreted differently to adhere to the intention expressed.\textsuperscript{276} The UsedSoft-judgement is the one case where the CJEU has directly addressed the issue of digital exhaustion. In principle, the distribution right and exhaustion principle of the InfoSoc-directive must be interpreted in line with the interpretation of the equivalent provision of the Software Directive in the UsedSoft-judgement. Interestingly, the Advocate General to the Vereniging Openbare Bibliotheken-judgment made this exact point.\textsuperscript{277} In UsedSoft the court considered, based on an argument by the Advocate General, that a transfer of ownership changes the nature of an act of communication to an act of distribution. If the conditions of exhaustion are fulfilled, exhaustion will apply. The court stated that this argument would hold true for the Software Directive whatever the legal position in the InfoSoc-directive, and implied that it also might apply to the InfoSoc-directive. In my opinion, the argument of the court is of merit. If there is a transfer of ownership you can no longer talk about dissemination as a service, in the form of communication or making available to the public. Dissemination as a service does not entail a transfer of ownership.

\begin{flushleft}
\textsuperscript{273} InfoSoc art. 3 (3) \\
\textsuperscript{274} Wiebe(2009), p. 115 \\
\textsuperscript{275} See C-128/11 para. 60 with referenced case law \\
\textsuperscript{276} C-128/11 para. 60 \\
\textsuperscript{277} Advocate General Opinion on C-174/15 para. 50
\end{flushleft}
The court also established “sale” as an autonomous concept of EU law. A “sale” is “an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.”278 This definition would also cover perpetual user licenses, where a copy had been permanently transferred and a payment corresponded to the value of the copy had been made. The conclusion of the CJEU in UsedSoft can however only apply within the scope of the distribution right. The court did not address the scope of the distribution right in the InfoSoc-directive or its particular context, as addressed above. The different intentions expressed by the legislator in the two directives are therefore an argument for a different interpretation of the InfoSoc-directive.

3.3.4.4 The historical context: the preparatory works
The preparatory works of the InfoSoc-directive consist of a Green Paper279 and a Follow up to the Green Paper,280 before an Initial Proposal281 to the text of the directive. I see two general considerations on digital dissemination established in the preparatory works. First, it is stated that distribution right and exhaustion principle only applies to copyright protected works fixed in tangible objects. The preparatory works consider distribution a type of free movement of goods, and consequently exhaustion applies. Distribution is not applicable to online transfer in digital information networks, which the preparatory works consider services.282 Second, the communication right, including the newly established making available right, is seen to protect acts of digital dissemination, which as services are expressly not exhausted.283 This right was meant to cover the central new uses in digital information networks.284 The preparatory works clearly speak against extending the distribution right and the exhaustion principle of the InfoSoc-directive to acts of digital dissemination. It can be pointed out that all these statements rest on a common assumption. That acts of digital dissemination are all services. This basic assumption was not accepted by the CJEU in UsedSoft, and Wiebe demonstrates that the classification does not necessarily make substantive sense.285 Therefore, it can be argued that the preparatory works to the InfoSoc-directive

278 C-128/11 para. 40 and 42
279 COM(95) 382 final
280 COM(96) 568 final
281 COM(97) 628 final
282 COM(95) 382 final p. 47-48, COM(96) 568 final p. 27, COM(97) 628 final para 18
283 COM(95) 382 final p. 56, COM(96) 568 final p. 25 and 27,
284 Reinbothe and Von Lewinski(ed.)(2015), p. 947
285 Wiebe(2009), p. 115
does not directly address acts of digital dissemination that share the central characteristics of an act of distribution.

3.3.4.5 **International law: The WIPO Copyright Treaty**

In the hierarchy of EU law, international obligations go before other sources of secondary legislation. As stated by the CJEU in Peek & Cloppenburg “it is settled case-law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community”. The WCT aimed to be an international solution to the issues copyright faced in the digital environment. The InfoSoc-directive implements the central provisions and system of the WCT part of EU law, as part of the international obligations of the Union. The WCT art. 8 establishes the right of making available to the public. Art. 6 establishes a distribution right, limited by the exhaustion principle. According to the Agreed Statement of the treaty: “the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.” Agreed statements are an officially recognized interpretative source for treaties. The InfoSoc directive also limits the application of the distribution right to the tangible, and establishes the making available right as part of the communication right. The assumption must be that the InfoSoc-directive should be interpreted in line with the WCT. The WCT was mentioned, but not given a lot of attention in the UsedSoft-judgment. Particular attention must be given to the WCT when interpreting the InfoSoc-directive.

3.3.4.6 **Teleological approach: The objective and effectiveness of EU law**

In a teleological interpretation, the CJEU will look at the objective of a provision, the effectiveness of the provision and the consequences of the interpretation, particularly on the general objectives of EU law.

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286 C-456/06 para. 30
287 WCT Preamble rec. 2
288 InfoSoc rec. 15
289 WCT Agreed Statement Concerning art. 6 and 7
290 Vienna Convention on the Law of Treaties art. 31 (2) a
291 InfoSoc rec. 28
292 InfoSoc art. 3
293 C-128/11 para 52; C-456/06 para 30
294 C-128/11 para. 52 and 60
I argued above that the CJEU relied heavily on a teleological interpretation to reach its conclusion in UsedSoft. Specifically, the court relied on the general objective of the exhaustion principle, which is to avoid partitioning of markets, to limit the distribution right to what is necessary to protect its specific subject matter. The court further made clear that the lack of application of the exhaustion principle on acts of digital dissemination endanger its effectiveness. The court’s formulation of the exhaustion principle refers to its objective to “avoid partitioning of markets” and limit copyright to its “specific subject matter”. This shows, as previously covered, that the court relies on previous case law and primary EU law in determining the scope of the exhaustion principle. As such, the basis for the court’s interpretation is the basic objectives of EU law in free movement in the internal market. As mentioned, the court will look to avoid an interpretation that endangers these fundamental objectives. These considerations are in principle general in application, and must effect the interpretation of the InfoSoc-directive to the same degree as the Software Directive. The teleological approach is the strongest argument for extending the scope of the distribution right and exhaustion principle also of the InfoSoc-directive to certain acts of digital dissemination.

3.4 The de lege lata situation for digital distribution and exhaustion in EU law

3.4.1 The Software Directive

The application of the distribution right and the exhaustion principle of the Software Directive have undergone a normative interpretation by the CJEU in UsedSoft. The court states clearly that both the exclusive right to distribute computer programs and the exhaustion of that right applies to both digital and physical dissemination of both digital and physical copies of computer programs. This includes the transfer of a copy of a program, on a time unlimited user right and for a fee corresponding to the value of the copy. The court limits the scope of its conclusion with a demand for functional equivalence in the dissemination process. The first acquirer must leave his copy “unusable at the time of its resale”. This limitation follows the traditional system of the distribution right, where ex-

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296 C-128/11 para. 62
297 C-128/11 para. 49
298 C-128/11 para 62
299 Lenaerts and Gutiérrez-Fons(2013), p. 27
300 C-128/11
301 C-128/11 para. 72
302 C-128/11 para. 61
303 C-128/11 para. 70
haustion applies to the specific copy that is distributed. It also reflects the characteristics of a physical act of distribution, where the actual physical copy changes hands. The interpretation of the court raises certain issues in relation to the WCT, but in my opinion this can be alleviated by a combined application of the freedom of movement rules and the Umbrella Solution.

3.4.2 The InfoSoc-directive

The CJEU has so far not made a normative interpretation on the application of the distribution right and exhaustion principle of the InfoSoc-directive on acts of digital dissemination. An interpretation of the InfoSoc-directive in light of its wording, context and international basis seems to argue against the application of the distribution right and exhaustion principle in the InfoSoc-directive.

The reference to “that object” in the wording of provision on exhaustion in the InfoSoc-directive, which is absent in the Software Directive, substantiate the idea that the exception only applies to physical copies. Further, the context makes clear that while the Software Directive applies to computer programs “in any form”, the InfoSoc-directive defines the distribution right as the “right to control distribution of the work incorporated in a tangible article.” The UsedSoft-judgment in principle is a contextual basis for the same interpretation in the InfoSoc-directive, as equivalent provisions should normally be interpreted the same. As the EU legislature has clearly expressed different intentions in the two acts of secondary legislation, the effect of that principle is however limited.

The interpretation of the InfoSoc-directive in accordance with the WCT, specifically art. 6 and 8 and the Agreed Statement Concerning art. 6 and 7, also speaks against digital distribution and exhaustion. The WCT was additionally only dealt with sparingly in the UsedSoft-judgement.

As pointed out, the objective and effectiveness of the exhaustion principle can argue for the opposite as teleological sources of interpretation. These interpretative sources will be of particular weight when they are based on primary law considerations. Primary law might, as mentioned, overrule both the expressed intention of the legislature in an act of secondary legislation and the international obligations of the EU.

I have argued above that the scope of the exhaustion principle in EU law relies on the freedom of movement rules. If the free movement of goods rules determine that exhaustion apply in a

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304 See point 3.3.3
305 Software Directive art. 1 (2)
306 InfoSoc rec. 28
307 C-128/11 para. 60
308 C-128/11 para. 60
situation as the one in the UsedSoft-judgment, that conclusion must be general in application. It does not rely on any particularity of computer programs.

As I have argued above the relationship with the WCT might be explained by classifying exhaustion of digital content under the three-step test in WCT art. 10. This applies also to the making available right. What you classify as distribution and exhaustion should only have to adhere to the WCT in substance, as made clear by the logic of Umbrella Solution.

The above considerations leaves us in a peculiar position. The InfoSoc-directive makes clear that exhaustion shall not apply digitally, but considerations from outside the directive might overrule this position. I do however consider that arguing the above directly on basis of the free movement rules might make the case clearer for any presiding court.

3.5 Choice of legal basis: Software directive or InfoSoc-directive

Since the application of exhaustion on acts of digital dissemination is far more debatable under the InfoSoc-directive, which directive applies to an act of digital dissemination is important.

The Software Directive covers the copyright protection of computer programs “in any form”.\textsuperscript{309} It is also \textit{lex specialis} in relation to InfoSoc-directive.\textsuperscript{310} That effectively means that any act of digital dissemination covered by the scope of the Software Directive must be interpreted in line with the UsedSoft-judgment.

It can be argued that the CJEU has made an exception from this general approach with regard to complex works, works that entail more than one basis for copyright protection.

In Nintendo\textsuperscript{311} the CJEU dealt with the circumvention of technical protection measures. The company PC Box made and distributed technological solutions that circumvented the in-built technological measure of portable and fixed Nintendo game consoles, which limited their application to original video games produced by Nintendo.\textsuperscript{312}

The judgement addresses the legal protection of video games, which consist of both a computer program and audiovisual components. The court concluded that these different components had to be seen as one combined work, and as a whole covered by the scope of the InfoSoc-directive. The court reached this conclusion despite recognizing that the Software Directive was \textit{lex specialis} to InfoSoc, as established in UsedSoft.\textsuperscript{313}

\textsuperscript{309} Software Directive art. 1 (2)
\textsuperscript{310} Infosoc-directive art. 1 (2)
\textsuperscript{311} Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl. Case C-355/12
\textsuperscript{312} C-355/12 para. 9 ff
\textsuperscript{313} C-355/12 para. 23
It is clear that classifying such complex work under the InfoSoc-directive can have a major effect in limiting the scope and application of the Software Directive and, consequently, the UsedSoft-judgement.

In the Bezpečnostní softwarová asociace the CJEU dealt with the copyright protection of so-called “graphic user interfaces”, in relation to the 1991 Software Directive. A graphic user interface is “an interaction interface which enables communication between the computer program and the user.”

As interfaces are not part of the expression of a computer program, they cannot find copyright protection in the Software Directive. The court did however make it clear that they can find protection in the InfoSoc-directive, if they merit protection as an “own intellectual creation”. The question is if a computer program with a graphic user interface must also be considered a complex work, and a computer program containing a graphic user interface must find protection as a whole in the InfoSoc-directive.

I would argue that it should not. The large proportion of computer programs utilize graphic user interfaces. That conclusion would mean the scope and application of the Software Directive would be almost non-existent. I presume that the computer program at issue in the UsedSoft-case contained a graphic user interface. The best reasons therefore speak against extending the conclusion of the Nintendo-judgment to cover graphic user interfaces. I do however note that one can make this argument on basis of the cases referred.

3.6 Remaining legal issues - reproduction, technological measures and license terms

3.6.1 The exclusive reproduction right

The exclusive reproduction right is closely interlinked with digital dissemination. The Software Directive art. 4 (1) and InfoSoc art. 2 both establish a technology neutral right to reproduction, “by any means and in any form”. As a digital dissemination process happens through the creation of a new copy, it will by definition include a reproduction. This right is not considered subject to the exhaustion of the distribution right, and therefore require the consent of the copyright holder, unless subject to an exception.

3.6.1.1 Software Directive
The CJEU dealt with the issue of reproductions in the dissemination process in the answer to questions one and three of the UsedSoft-judgement.

314 Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury Case C-393/09
315 C-393/09 para. 40
316 Software Directive art. 4 (2); InfoSoc art. 4 (2)
317 C-128/11 para. 73 ff.
The Software Directive art. 5 (1) establishes *sui generis* that a reproduction “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.”\(^{318}\)

The issue is whether the secondary acquirer is a lawful acquirer in the sense of the provision. The CJEU concluded that a secondary acquirer was a lawful acquirer in the sense of art. 5 (1). As “the copyright holder cannot object to the resale of a copy of a computer program” in which the distribution right has been exhausted, “a second acquirer of that copy and any subsequent acquirer are ‘lawful acquirers’ of it within the meaning of Article 5(1)”.\(^{319}\) This applies as long as the reseller makes his copy unusable at the time of transfer.\(^{320}\) The court did not accept the argument that only someone directly authorized by the copyright holder could be a “lawful acquirer”. That would allow the copyright holder to control the resale of his work even after the exhaustion of the distribution right, and leave the exhaustion principle ineffective.\(^{321}\) The Advocate General had relied on this argument to conclude in the opposite.\(^{322}\)

### 3.6.1.2 InfoSoc directive

There is no comparable exception to art. 5 (1) of the Software Directive in the InfoSoc-directive. The InfoSoc-directive exhaustive list\(^{323}\) exceptions in art. 5, are, with one exception, are optional and must adhere to the three-step test in art. 5 (5).

In my opinion, none of the exceptions in art. 5 are applicable to a commercial resale. It is also questionable if such an exception would pass the three-step test. The application and interpretation of the test is strongly debated and varies widely in the different Member States.\(^{324}\) Torremans argues that the effectiveness of the exhaustion principle, which featured prominently in the UsedSoft-judgment, means the reproduction right should not function as a secondary limitation to exhaustion.\(^{325}\)

He sees the reproduction right as a merely ancillary right to the distribution right. He argues that the exhaustion principle is an incarnation of the free movements of goods rules, and that a fundamental principle of primary EU law cannot be left ineffective by an ancillary rule.\(^{326}\) In support, Torremans points to Parfums Christian Dior SA and Parfums Christian Dior BV v

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318 Software Directive art. 5 (1)
319 C-128/11 para. 80
320 C-128/11 para. 70
321 C-128/11 para. 83
322 Advocate General Opinion to C-128/11 para. 98
323 InfoSoc rec. 32
324 Griffiths(2009), p. 3-6; see the discussion below in part. 4.4.2.1
325 Torremans(2014)
326 Torremans(2014), p. 8-9
Evora BV Case C-377/95, where the reproduction right were not allowed to limit the exhaustion of trademarks.\(^{327}\)

The argument can be criticized. It is a well-established principle of EU copyright law to interpret exceptions narrowly.\(^{328}\) The Advocate General to the UsedSoft-judgment considered that the introduction an additional exception to the reproduction right, which is not establishes in EU legislation would run counter to the principle of legal certainty.\(^{329}\) That the idea rests on primary law does however mean the CJEU could legally defend applying a similar approach on secondary legislation like the InfoSoc-directive. Interestingly, the CJEU seems to have applied something similar to Torremans idea in the Vereniging Openbare Bibliotheken-judgment by including the necessary reproductions in the lending process in its definition of the lending right.\(^{330}\)

It is clear that the reproduction raises additional considerations about the application of the exhaustion principle of the InfoSoc-directive on acts of digital dissemination.

### 3.6.2 Contract terms and technological measures?

If we accept that the exhaustion of the distribution right to a digital copy has taken place, technological measure or prohibited by contract terms might still impact the possibility of a resale.

The degree to which a right holder can rely on a contract to hinder legitimate acts in the sense of copyright raises issues of contract law and competition law.\(^{331}\)

If a contract is binding and not in violation of competition rules, whether contract terms can override copyright exceptions generally is considered an “open question” or unregulated in EU law aside from the cases where it is specifically regulated.\(^{332}\)

The consequence of this must be that the issue is the competence of the Member States as far as EU copyright law is concerned. In my opinion, as long as the issue is unregulated, this must be the case in all instances where restrictive contract regulation and copyright exceptions clash. If unregulated, the presumption would be that contracts are binding, *pacta sunt servanda*.

The CJEU arguably departs from this approach in the UsedSoft-judgment. A license that labelled the contractual relationship a “non-exclusive non-transferable user right” did not pre-

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\(^{327}\) Torremans(2014), p. 10
\(^{328}\) See C-5/08 para. 56 with referred case law
\(^{329}\) Advocate General Opinion to C-128/11 para. 99
\(^{330}\) See below in part 4.4.1
\(^{331}\) Rognstad(2009), p. 222; Rognstad(2008), p. 429-430
\(^{332}\) Dreier and Hugenholtz(2016), p. 455; Reinbothe and Von Lewinski(2015), p. 115-116; contract terms that substantially alters the contractual relationship must be given effect, p. 999. In UsedSoft they did not.
vent the effects of exhaustion as the transaction in question substantially amounted to a sale in the sense of Software Directive art. 4 (2).\textsuperscript{333} The court argued that the effect of exhaustion is that copyright holder can no longer control the further distribution of the work, notwithstanding contract terms to the contrary.\textsuperscript{334} This meant that the exception from the reproduction right in the Software Directive art. 5 (1) could not be restricted by contract, even if the issue was unregulated. It therefore seems clear that contract terms limiting a resale after exhaustion does not have legal effect.

InfoSoc-directive art. 9 states that the directive “shall be without prejudice to provisions concerning […] the law of contract.” This was however seemingly only a reference to EU regulations in force at the time of its enactment.\textsuperscript{335} Therefore the logic of the UsedSoft-judgment should apply equally to the exhaustion principle in the InfoSoc-directive.

Further, InfoSoc rec. 13 makes it clear that the exceptions of art. 5 (2) and (3) from the reproduction right shall not “prevent the definition of contractual relations designed to ensure fair compensation for the rightholders”. This does however only apply “insofar as permitted by national law”, which means regulating the issue must still be the competence of the Member States.

Technological protection measures that prevent acts of digital dissemination or reproductions is a topical issue for digital distributions.

InfoSoc art. 6 (1) precludes the circumventions of “technological measures” as long as they are “effective”. According to art. 6 (3) the term technological measure cover “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder”. An “effective” technological measure is “an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism” that “achieves the protection objective.”

InfoSoc art. 6 (4) establishes both mandatory and optional exceptions from technological measures. It is primarily up to the copyright holder to provide circumvention. The Member State shall only intervene in lieu of voluntary measures.

Circumvention is mandatory for reproductions for art. 5 (2) a, photocopying, c, specific reproductions made by libraries, d, quotations, e, broadcasts for social institutions. For reproductions and acts of communication for art. 5 (3) a, illustrations for teaching or scientific research, b, people with disability, e, administrative, parliamentary, or judicial proceedings. Circumvention for art. 5 (2) b on private copying is voluntary.

\textsuperscript{333} C-128/11 para. 49
\textsuperscript{334} C-128/11 para. 76
\textsuperscript{335} Dreier and Hugenholtz(2016), p. 487
The exhaustion-principle is not among the copyright exceptions noted in art. 6 (4). This means circumvention of effective technological protection measures to allow a legitimate resale after exhaustion would be prohibited. Further, as none of the exceptions in art. 5 are applicable to a reproduction made as part of a commercial resale they could not form the basis for circumvention. The Software Directive has its own *lex specialis* provision on technological measures in art. 7.\(^{336}\) It differs from InfoSoc art. 6 in that it refers to circumvention of “technical devices”, rather than “technological measures”, which is considered more limited. Further, it only protects against intentional circumvention. Finally, it only protects against the circulation or possession of means for circumvention for commercial purposes with the sole intended purpose to remove or circumvent technical devices. An additional purpose with the means, beyond the insignificant, legitimates the circumvention. It has been questioned whether this system is in accordance with WCT, which requires effective remedies against circumvention.\(^{337}\) A legitimate reason for exploitation has not been seen as enough to fulfil the criteria for “sole intended purpose”, as the purpose of the means would still be solely the circumvention.\(^{338}\) I find this view questionable. If a technological solution circumvents a potential technological device in the process of a legitimate resale, those means would clearly have additional purposes beyond circumvention, which would exist whether circumvention was necessary or not. The UsedSoft-judgement specifically state that a copyright holder can avail himself of technical measures, albeit in relation to ensuring a reseller leaves his copy unusable.\(^{339}\) It is interesting to contemplate what the court would have made of a technological device that hindered a resale. In particular as the relationship between the exhaustion principle and technological measures/devices is unaddressed in the legislation. Interestingly, Hoeren considers that the UsedSoft-judgment means that technological measures that hinder a resale after exhaustion cannot be given effect. This would undermine the goal of the EU to “reduce the restrictions in the Digital Single market”.\(^{340}\) This is however in an article about German law, and the statement does not offer much detail on its rationale. If the dissemination is considered an act of making available, circumvention for the benefit of exceptions inn art. 5 is further subject to contract terms.\(^{341}\) This is not strictly relevant in our case, as none of the exceptions in art. 5 is strictly applicable to a commercial resale. It does show the general importance of classification of exclusive rights.

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\(^{336}\) Dreier and Hugenholtz(2016), p. 268

\(^{337}\) Dreier and Hugenholtz(2016), p. 269

\(^{338}\) l.c.

\(^{339}\) C-128/11 para. 79

\(^{340}\) Hoeren(2016), p. 596-597

\(^{341}\) InfoSoc art. 3; 6 (4) para. 4; rec. 53
Technological measures is the additional issue that raises the clearest problems for effective digital distribution and exhaustion.

3.7 The aftermath of the UsedSoft-judgment

3.7.1 Introduction

The UsedSoft-judgment engendered both immediate reactions and extensive analysis in legal theory. The judgment has been labelled “remarkable”.\(^{342}\) It can therefore be interesting to take a short look at the impact of the UsedSoft-judgment since it was delivered in 2013.

3.7.2 The de lege lata impact in national law

After the CJEU delivered its preliminary ruling in UsedSoft, the case was returned to the German Federal Court of Justice. It in turn returned the case to the Higher Regional Court of Munich with some “guidelines for practical implementation” of the conditions for digital exhaustion established by the CJEU.\(^ {343}\)

In UsedSoft exhaustion was made contingent on an authorized download of a computer program, with a time unlimited user license, for a fee corresponding to the value of the copy, which must be left unusable at the time of a resale.\(^ {344}\)

In their guidelines, the German Federal Court of Justice added that the first acquirer must ensure that the second acquirer only uses the program in line with the license terms granted to the first acquirer. The burden of proof for meeting the condition of the CJEU is on the party who claimed exhaustion had taken place.\(^ {345}\)

In the specific case, UsedSoft failed to prove that Oracle had consented to the downloads in exchange for remuneration and had granted perpetual licenses for the copies. These are issues of documentation that can be remedied by improvement in documentation procedures.\(^ {346}\)

UsedSoft could further not prove the first acquirer’s copy was rendered unusable at the time of the resale.\(^ {347}\) This is a technological issue, which can be solved by so-called “forward and delete” technology.

Finally, UsedSoft could not assure that the use of the second acquirer was in line with the original license agreement. This condition is more problematic. A contract normally bind the

\(^{342}\) Rognstad (2014), p. 2


\(^{344}\) C-128/11 para. 72


\(^{346}\) Schneider(2015)

\(^{347}\) Schneider(2015)
parties, and the feasibility of transferring the obligations to a third party is considered unclear.

The result of the case was that UsedSoft agreed to a cease and desist order. In light of the preliminary ruling of the CJEU that result is quite striking. Legal and technological sloppiness by UsedSoft is clearly partly to blame, but the decision is also a clear example of how national courts can limit the impact of CJEU judgements by adding conditions for their application. The legal merit of adding additional conditions to a clear interpretation of EU law can be questioned. There has to my knowledge not been much debate on the consequences of the UsedSoft-judgements outside legal theory. This does perhaps demonstrate that its actual effects have not been that considerable.

One example I have found sees a clear unexploited economic potential in second hand software, especially that owned by bankrupt companies. The article considers that doubts about the legality might be the reason for the lack of development of a secondary software market after the UsedSoft-judgment, but that this might change in the future. The judgment might therefore have a more considerable impact in the future.

3.7.3 Technological developments

The impact of digital exhaustion might be mitigated by the rise of technological solutions that disseminate digital content as pure services. In particular by cloud computing and Software as a Service solutions. This point was made by Wiebe as early as 2009. Cloud computing is in essence remote hardware a user might access on demand through a web browser or program interface to use of computer memory or software without requiring storage in local memory. Software as a Service solutions allows the user the use of applications, like computer programs, remotely on the cloud hardware infrastructure through the internet.

Cloud services remove the need for storage in local memory. With remote storage, you can disseminate copyright protected works through services like streaming. Streaming is the delivery of data “as a continuous flow”. It allows the simultaneous dissemination and enjoyment and does not require a permanent local copy. An example of a streaming provider is Spotify,

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348 Schneider(2015)
350 For another example on linking, see IPKat(2016)
351 A newspaper article from the Netherlands, Het Financieele Dagblad(2016)
352 Het Financieele Dagblad(2016)
353 Wiebe(2009), p. 9; see also Hojnik(2014), p. 77-78
354 COM(2012) 529 p. 3-4; National Institute of Standards and Technology(2011)
who stream music to users. Streaming services are expected to replace so-called “progressive download” platforms, like Apple’s iTunes-service. Here the download of an entire data file, a permanent local copy, is necessary for use.\footnote{Lifewire(2017a)}

The recent development of so-called blockchain technology might increase the feasibility and security of digital exhaustion. Blockchain technology consist of “a distributed database that maintains a continuously growing list of ordered records called blocks, containing transactions.”\footnote{Jansen and Ølnes(2017), p. 91} It can be used to “register, confirm, and transfer any kind of contract and property”\footnote{Beavan and O’Dair(2017), p. 473} and allows transactions “without the need of a trusted third party”.\footnote{Nakamoto(2008), p. 1} Blockchain potentially allows you to keep a record of ownership for every legitimate digital copy subject to a resale after exhaustion.

I note that both the perceived potential and issues of blockchain technology are widely debated in legal theory.\footnote{For an overview in the context of the music industry, see Beavan and O’Dair(2017), p. 473-476}

The development of digital technology shows that both solutions that potentially lessen the impact of digital exhaustion and make it more feasible and secure. Importantly, cloud computing and Software as a Service technology allow right holders the choice to disseminate their works as pure services.
4 Public lending of e-books

4.1 Introduction

The concept lending as established in EU law cover the making available a copy of the work for a temporary period by an establishment open to the public, when not done for direct or indirect commercial advantage.\(^{360}\)

Conceptually the lending right stands in a position between the communication and making available right and the distribution right. Lending is considered a service in the sense of EU law as it is endlessly repeatable, but the right has also been considered “copy-based” and related to the distribution right.\(^{361}\) The lending right therefore resists easy classification.

EU law also establishes a competence for a broad derogation from the lending right in the PLR derogation. Member States may exempt public libraries from the lending right as long as the creator of the work receives remuneration. The remuneration can be determined on basis of the state’s cultural promotion objectives and the certain categories of libraries can be exempted.\(^{362}\)

The rationale behind establishing lending as an exclusive right rather than a right to remuneration for use was the perceived economic connection between the lending and rental rights. There was a fear that increased activity in the lending, particularly of music and film, would undermine the rental business and role of the rental right.\(^{363}\) The PLR derogation was established so the ability of the Member States to develop cultural policies should not be undermined. In particular, it aimed to “guarantee” the access of the public to the lending done by public libraries.\(^{364}\)

In part, the broad PLR derogation was a “compromise”. The introduction of lending as an exclusive right was in itself highly controversial. Several EU Member States did not recognize an exclusive lending right before the directive and “[a]bout one-half” resisted its introduction.\(^{365}\) Several EEA members have also not managed to establish a working PLR scheme for different reasons.\(^{366}\) This has led to a number of infringement cases from the Commission for failing to implement the exclusive lending right or make an acceptable exception.\(^{367}\) The relative level of protection for lending in the directive must be seen in view of this reality.

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\(^{360}\) Rental and Lending Directive art. 2 (1) b
\(^{361}\) Ficsor(2002), p. 498
\(^{362}\) Rental and Lending Directive art. 6
\(^{363}\) Von Lewinski and Watler(ed.)(2010), p. 260
\(^{364}\) l.c.
\(^{365}\) Von Lewinski and Watler(ed.)(2010), p. 260-261
\(^{366}\) PLR International, PLR Schemes in development
The systems that implements for the derogation in the different Member States can be referred to as Public Lending Right (PLR) systems. According to the PLR International Network there are 29 current PLR systems in Europe.\(^{368}\)

There are four recognized approaches to the lending right in the EU. It can exist as an exclusive right in copyright terminology, as a remuneration right, as part of the cultural support policy of the state or as a mix of these.\(^{369}\)

European PLR systems have several variables. They can be copyright based or non-copyright based. They cover different copyright protected subject matter, and different public lending institutions. The remuneration can be calculated by the number of copies held by public libraries, “copy based”, or the number of copies lent by public libraries, “loans based”. The amount of remuneration paid per loan or copy, who is responsible for paying the remuneration and the system by which the remuneration is distributed will further vary. As the remuneration can be established on the basis of the Member State’s cultural promotion objectives, it does not have to adhere to market prices.

There are currently only three EEA members that employ a copy based system. These are Norway, Denmark and France. Most countries employ a loans based approach.\(^{370}\)

The general legal consensus in the EU has been that the Rental and Lending Directive and the national PLR systems does not extend to digital acts of lending.\(^{371}\) In this understanding, the lending of digital copies entail an act of making available and an act of reproduction covered by the InfoSoc-directive. Therefore such “lending” requires the consent of the copyright holder.\(^{372}\)

The legal basis for digital is in various license models. Normally an aggregator will acts as an intermediary between libraries and publishers. They will license ebooks from publishers, and license them on to libraries.\(^{373}\)

The most usual models are the “license model” and the “click model”. The “license model” allows one simultaneous loan per license, and the library pays for each license. The “click model” allows several simultaneous loans, but the library pays per loan.\(^{374}\)

Other models exist. In “subscription models”, libraries pay a sum per lender for access to a catalogue of books. In the “user-based models”, lenders request the loan of a book from a

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\(^{368}\) PLR International, *Frequently Asked Questions*

\(^{369}\) Ibid.; see also COM(2002) 502 final

\(^{370}\) PLR International, *Established PLR Schemes*


\(^{372}\) Sganga(2016), p. 6

\(^{373}\) Sganga(2016), p. 5-6

\(^{374}\) Ministry of Culture(2015b), p. 20
database, and the library decides whether to acquire the specific ebook.\textsuperscript{375} Mostly the result is a mix of the different models.\textsuperscript{376}

The Rental and Lending Directive in principle applies to all “works”.\textsuperscript{377} In the following, I will for the sake of simplicity focus on the lending of ebooks.

An ebook can be defined as “a book or text-based work composed in or converted to digital format for display on a computer screen or handheld device, which is made available as a separate entity.”\textsuperscript{378} In the terminology of this thesis, an ebook will be considered as a digital copy of a book.

The relevant stakeholders in the PLR system are libraries and authors. For digital lending a secondary right holder, like a publisher, will normally hold the rights to the exploitation of the work.\textsuperscript{379} There are therefore three stakeholders in digital lending, libraries, publishers and authors.

Libraries have a public mission to “further the preservation or dissemination of knowledge”\textsuperscript{380} and provide “free and public access to information” through public lending.\textsuperscript{381} Different libraries serve different purposes. National libraries and scientific libraries will normally focus on building collections for on site consultation, to support scholarly and scientific research and as part of cultural preservation. Public libraries primarily engage in lending, to provide the public with material for private study and consultation without discrimination.\textsuperscript{382}

Libraries see issues with the license models in access to content, prohibitive pricing, one sided license terms and frictions that limit the potential of digital technology. Publishers support frictions to avoid competition with the commercial market and piracy. Authors have a general interest in fair remuneration, whatever the model.\textsuperscript{383}

\textsuperscript{375} Ibid. p. 21
\textsuperscript{376} Ibid. p. 5
\textsuperscript{377} See Rental and Lending Directive art. 1 (1), which refer to the lending of “works”
\textsuperscript{378} EBLIDA(2014)
\textsuperscript{379} Andreassen(2006), p. 315
\textsuperscript{380} Dusollier(2014), p. 214
\textsuperscript{381} Davies(2013), p. 13
\textsuperscript{382} Dusollier(2014), p. 214-215
\textsuperscript{383} Sganga(2016), p. 6
4.2 The Rental and Lending Directive (2006/115/EC)

4.2.1 Introduction

The Rental and Lending Directive was originally established in 1992. The directive was codified in 2006 without amendments to the provisions on rental and lending, but with changes to the numbering of the articles. The Rental and Lending Directive has two chapters. The first establishes rules at EU level for the exclusive right to rental and lending. The second chapter establishes rights for performers, producers and broadcasting associations, known as related rights. With regard to the lending right, it is the first chapter of the directive that is of interest. The lending right was introduced in Chapter 1 of the directive at a later date than the rental right, which was introduced prevent that national regulations resulted in “obstacles to trade” that impeded the achievement of the internal market. The commission had previously stated it did not regard regulation of lending as “urgently necessary”.

4.2.2 The legal basis: The exclusive lending right and PLR derogation

The Rental and Lending Directive harmonizes the exclusive right to rental and lending at the EU level. The Rental and Lending Directive art. 1 (1) establishes:

“In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).”

The rental and lending rights as established in EU law are separate rights to the distribution right, which are explicitly not subject to exhaustion of the distribution right. “Lending” in the sense of the directive is specifically defined as “making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage,

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385 Rental and Lending Directive Chapter 1
386 Rental and Lending Directive Chapter 2
387 Von Lewinski and Watler(ed.)(2010), p. 255
388 Von Lewinski and Watler(ed.)(2010), p. 254
389 Rental and Lending Directive art. 1 (2)
when it is made through establishments which are accessible to the public”. 390 “Rental” cover the same act “for direct or indirect economic or commercial advantage”. 391

The term making available does not refer to the making available right. It only means to rule out rental or lending for further public exploitation, like inter-library loans or the rental and lending of films to cinemas that then display them to the public. 392

The Rental and Lending Directive art. 6 (1) establishes a derogation from the exclusive lending right:

“Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.”

The article establishes that the Member States “may”, meaning the derogation is optional. Further, Member States “may exempt certain categories of establishments from the payment of the remuneration”. 393

The CJEU has made certain clarifications about the PLR derogation. In Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat Case C-271/10 the CJEU dealt with the valid bases for calculating remuneration. In the case VEWA, a copyright management society, had sought the annulment of a Belgian royal decree that fixed “a flat rate of remuneration of 1 euro per [registered borrower] per year”. 394

The court made it clear that remuneration as based on cultural promotion objectives does not have to be equivalent to the perceived loss of the author. 395 It can however not be “purely symbolic” or “completely disassociated from the elements which constitute that harm”. It must allow “authors to receive an adequate income” and take “account of the extent to which those works are made available.” 396

The court disallowed the determination of remuneration on basis of the number of potential lenders as too disassociated from the number of loans made. The two approaches recognized by the court were the number of copies made available by public lending establishments, 397 copy based and the number of works made available to the public, 398 loans based.

390 Rental and Lending Directive art. 2 (1) b
391 Rental and Lending Directive art. 2 (1) a
392 Rental and Lending Directive rec. 10; Von Lewinski and Walter(ed.)(2010), p. 261-262
393 Rental and Lending Directive art. 6 (3)
394 C-271/10 para. 15-19
395 C-271/10 para. 33
396 C-271/10 para. 34 and 37
397 C-271/10 para. 38
398 C-271/10 para. 40
The CJEU has also several times dealt with the competence to exempt certain categories of establishments from payment of remuneration in art. 5 (3). One example is Commission of the European Communities v Kingdom of Spain Case C-36/05. Here the court determined that the Member States cannot exempt “almost all, if not all, categories of establishments”, as that “would deprive authors of remuneration allowing them to recoup their investments, with inevitable repercussions for the creation of new works”.399 The Spanish PLR system exempted in principle all public libraries, all public educational libraries and all non-profit cultural, scientific or educational libraries.400 The CJEU considered this to go too far. It stated the system must enable “relevant criteria to be determined for drawing a valid distinction between categories of establishments”.401

4.2.3 Vereniging Openbare Bibliotheken (C-174/15)

4.2.3.1 Introduction
The CJEU dealt with the issue of ebook lending in the Vereniging Openbare Bibliotheken-judgement. The case was a reference from the Rechtbank Den Haag (The Hague District Court) on the interpretation of the PLR system set up in Dutch copyright law. The Dutch PLR system is copyright based. It establishes lending as an exclusive right, with a remuneration right exception in return for “payment of equitable remuneration”. The system covers authors, illustrators, photographers, editors, translators, publishers and other copyright holders. That it covers secondary copyright holders is a conscious choice by the Dutch legislator, as it is not demanded by the Rental and Lending Directive.402 The system covers as subject matter books, magazines, games, audio, video, multimedia, works of art and musical scores, but not software. It covers public libraries and some specialized institutions, but exempts school and university libraries.

The system is loans based, but extensions are not counted. The collection society Stichting Leenrecht and the Association of Public Libraries, Vereniging Openbare Bibliotheken, negotiate the level of the fee per loan, overseen by the public body Stichting Onderhandelingen Leenvergodingen. The PLR institutions are responsible for payment of the remuneration. Stichting Leenrecht collects the remuneration and distributes it to different collective management societies representing different groups of right holders. Almost every groups of right holders have made their own collective organization.403

399 C-36/05 para. 27
400 C-36/05 para. 8
401 C-36/05 para. 34
402 Rental and Lending Directive art. 6 (1)
403 See PLR International(2014); PLR International(2016), p. 8-31
Specific characteristics of the Dutch PLR system is that it remunerates copyright holders and makes the public libraries responsible for the payment. This arguably makes the Dutch PLR system comparatively one of the more copyright-industry friendly.

One recognized issue of the Dutch PLR was whether system was whether the system could cover the lending of ebooks. The question was discussed at official level throughout the 2000s. In the end, the relevant authorities concluded in several cases that the Dutch PLR system did not cover lending.

First, the managing board of Stichting Onderhandlingen Leenvergodingen concluded in 2010 that Dutch system in their consideration did not cover ebooks or digital lending. Second, the Information Rights Institute at the University of Amsterdam and the consultancy firm SEO wrote a report, which concluded that the PLR system as established in Dutch law did not extend to ebooks. The Ministry of Culture adopted that position, and subsequently drafted new legislation establishing a national digital library to allow digital lending.

In response, Vereniging Openbare Bibliotheken challenged the interpretation for the Dutch government for the courts on behalf of the public libraries. The court referred four questions to the CJEU for a preliminary ruling.

As lending of ebooks was considered a pure copyright transaction, author remuneration was regulated by the contractual relationship between the authors and publishers. This remunerated authors next to nothing for digital lending. Therefore a collective management society for authors of literary works, Stichting Lira, and creators of visual artworks, Stichting Pictoright, intervened in the case on the side of public libraries. A publishers association intervened in support of the right holder’s position.

4.2.3.2 The first question: The Rental and Lending Directive and the digital lending of ebooks

By the first referred question the court understood the referring court to ask whether scope of the concept of “lending” in the sense of the Rental and Lending Directive extended to lending of digital copies of books. Specifically:

“where that lending is carried out by placing that copy on the server of a public library and allowing the user concerned to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.”

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404 PLR International (2016), p. 28
405 Treatment based on C-174/15 para. 17-26
406 Advocate General Opinion on C-174/15 para. 17
407 C-174/15 para. 27
The court concluded on this question in the positive. The concept and provisions on lending in the Rental and Lending Directive “must be interpreted as meaning that the concept of ‘lending’, within the meaning of those provisions, covers the lending of a digital copy of a book”. The conclusion was limited to the specific circumstances where: the digital copy of the book is placed on the server of the library; a lender is allowed to download it; one copy is only available for one loan at a time; the lending period ends automatically; the copy of the lender is made unusable at the end of the lending period.408

4.2.3.3 Issues that merited particular attention
The court addressed two issues of specific importance to its conclusion on question one. It first looked at the scope of the lending right and whether it precluded digital lending. Then it addressed whether the provisions on lending in the Rental and Lending Directive covered digital acts of lending.

The court first addressed “whether that (sic.) are grounds to justify the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of Directive 2006/115.”409

The court concluded in the negative, stating it found no decisive ground to “preclude the concept of ‘lending’, within the meaning of that directive, from being interpreted, where appropriate, as also including certain lending carried out digitally.”410

The court did not consider the wording of the directive to make any distinction on its application on digital lending.411 The Advocate General had addressed the argument that the term “originals and copies” in the Rental and Lending Directive had to be interpreted in conformity with the understanding of the same term in the InfoSoc-directive. That Advocate General stated that if this demand was absolute the relevant terms in all directives would have to be interpreted in line with the court’s interpretation of them in the UsedSoft-judgment.412

The reference to UsedSoft shows that even if a reading of the term “originals and copies” in the InfoSoc directive that precludes digital distribution is accepted, the term has not been interpreted consistently throughout EU law. Additionally, the UsedSoft-judgement is the only case where the court has addressed this question directly. The Rental and Lending Directive is

408 C-174/15 para. 54
409 C-174/15 para. 30
410 C-174/15 para. 39
411 C-174/15 para. 28 and 29
412 Advocate General opinion on C-174/15 para. 50 ff
also *lex specialis* in relation to InfoSoc,\(^{413}\) which means a divergent interpretation of the Rental and Lending Directive must prevail.

The court also considered the preparatory works as part of the context of the directive. Specifically, the Explanatory memorandum to the original Rental and Lending Directive.\(^{414}\) Here the Commission, in the words of the court, express the “desire to exclude the making available by way of electronic data transmission from the scope of Directive 92/100.”\(^{415}\)

The court does however question the relevance of this statement on two grounds. The statement only refers to the “the electronic transmission of films”. The court states that the Commission most likely had not considered the possibility of digital lending of ebooks at the time of writing the Memorandum, as they were not extensively used at that time.\(^{416}\) Further, the court found no “no direct expression” of this consideration in the wording of the directive.\(^{417}\)

The Commission is quite specific in stating that “electronic data transmission (download)” are not to be covered by the directive. Based on the actual words of the Commission it does however seem clear that it only consider “electronic data transmission” purely in the sense of direct and simultaneous communication or broadcasts “for reproduction on the screen of a private household”.\(^{418}\) This is not an equivalent concept to an act of digital lending, which involves the non-simultaneous dissemination of a copy for a distinct period of time.

The Commission has also been back and forth on the issue in later communications. It first considered the lending right to extend to digital transmission in 1995,\(^{419}\) but then left this position in 1996 under pressure from the Member States to consider all acts of digital dissemination communication to the public.\(^{420}\)

In my view, it is clear that the Commission did not envisage this sort of delivery of a book as a possibility and did not directly address it.

The court further considers the impact of the international obligations of the EU. It is a general principle that acts of EU secondary law must be interpreted in line with the Union’s international obligations, which is stated outright in rec. 7 of the Renal and Lending Directive.\(^{421}\)

The lending right has not been included in any of the major international copyright treaties. The rental right was made part of TRIPS art. 13 and the WCT in art. 7.

\(^{413}\) InfoSoc art. 1 (2)
\(^{414}\) COM(90) 586
\(^{415}\) C-174/15 para. 41
\(^{416}\) C-174/15 para. 42
\(^{417}\) C-174/15 para. 43
\(^{418}\) COM(90) 586 p. 34-35
\(^{419}\) COM(95) 382 p. 58
\(^{420}\) COM(96) 568 p. 12-14
\(^{421}\) C-456/06 para. 30; C-175/15 para. 33
The WCT Agreed Statement Concerning art. 6 and 7, which apply to the distribution right, also applies to the rental right in art. 7. The Agreed Statement makes clear that the right should only apply to “fixed copies that can be put into circulation as tangible objects.” In the opinion of the court this precludes the application of the rental right on the rental of digital copies of copyright protected works.

The court concludes in the opposite with regard to the lending right, as it considers that the rental and lending right are separate rights, and that a consideration with regard to one cannot rule out the application of the other.

The court refers to rec. 3 and 8 of the directive, which in certain language versions refer to the rental and lending “rights”. In addition, the division of the definition of the concepts in art. 2 (1) a and b shows that the subject matter of the concepts are different.

In my opinion, the rental right and the lending right are obviously related. They share central characteristics and they cover similar acts. They both refer to the “making available for use, for a limited period of time”, and deal with such acts on “originals and copies”. However, they also differ at a basic level. One right is for commercial advantage while the other is expressly not for such advantage. Further, the exceptions from the exceptions of the rules are dealt with in different provisions of the directive, respectively art. 5 and 6. The former allow commercial rental in return for remuneration, the latter an exemption for public lending on basis of cultural promotion objectives.

This shows that the rights while related look to address different interests. I therefore agree with the court that the two rights does not necessarily have to be interpreted in the same way.

The court further looked at teleological sources of interpretation. First, it considered the general objective pursued by the directive as established in rec. 4. The directive “must adapt to new economic developments such as new forms of exploitation.” This can be referred to as teleological interpretation in sensu strictu, as mentioned above. Digital lending is a new form of exploitation of copyright, and the the Rental and Lending Directive must obviously adapt to it to fulfill its objective.

The court also refers to the general principle of EU copyright that it should establish a high level of protection, which that the Rental and Lending Directive must be interpreted on basis

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422 WCT Agreed Statement Concerning art. 6 and 7
423 C-174/15 para. 35
424 C-174/15 para. 39
425 C-174/15 para. 37
426 C-174/15 para. 38
427 Rental and Lending Directive art. 2 (1) a and b
428 C-174/15 para. 45
The court sees this principle implicitly in rec. 5, while it is stated expressly in InfoSoc rec. 9. On that basis, the court found no decisive ground to preclude the application of the concept of lending on digital acts of lending in the sense of the Rental and Lending Directive. On the whole, the argument of the court seems of good merit. The arguments that can be raised against the interpretation of the court is the use of the term “original and copies”, the statement of the Commission in the preparatory works with regard to downloads and the contextual relationship with the InfoSoc-directive. None of these arguments are unequivocal, and all are debatable as established by the court.

It could be argued that the InfoSoc-directive is more specialized to the digital environment than the Rental and Lending Directive. The Rental and Lending Directive is however lex specialis to InfoSoc. That is because it addresses the specific considerations that should be made in the context of public lending, which the InfoSoc-directive does not. Therefore the position of the court seem of good merit.

The high level of protection is a recognized principle of EU copyright law. It could be argue the conclusion of the court lowers the level of copyright protection. The point is that the court is not directly addressing the PLR derogation in art. 6, but the system of lending in the Rental and Lending Directive as a whole. In short, the court is expanding the scope of the lending right, and strengthening author protection. That the exceptions to this right in general also have effect on digital lending is an additional consequence, which does not affect the author. This seems in line with the author centric nature of the PLR system.

The court next looked at the application of art. 6 (1) on a digital act of lending, stating “it must next be verified whether the public lending of a digital copy of a book, carried out in conditions such as those indicated in the question referred, is capable of coming within the scope of Article 6(1) of Directive 2006/115.”

The court answered this in the positive. Concluding that “the concept of ‘lending’, within the meaning of [the provisions of the Rental and Lending Directive], covers the lending of a digital copy of a book”.

The court did make certain demands for the digital lending process to cohere to a physical lending process. The process must have “essentially similar characteristics to the lending of printed works” as established in art. 2 (1) b. Specifically, it must be limited to one loan of one copy at a time, by a time limited lending period and end automatically.

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429 C-174/15 para. 46, 48
430 C-174/15 para. 47
431 C-174/15 para. 49
432 C-174/15 para. 54
433 C-174/15 para. 53
It should be noted that as the court had already dealt with the wording, context, international law and teleological interpretation in sensu strictu when addressing whether anything precluded the application of the lending right on digital acts of lending. The court therefore turned to additional interpretative sources.

The court first applied a teleological interpretation in the sense of the *effet utile*, the effectiveness, of the PLR derogation. It is an established concept of EU copyright law that exceptions must be interpreted strictly, but regard must still be taken to safeguard their effectiveness and purpose.\(^{434}\) The CJEU considered the effectiveness of the exception to achieve its aim of cultural promotion, seen in context of the importance of the issue of digital lending. This meant that the provisions on lending in the Rental and Lending Directive had to be interpreted to include digital lending.\(^{435}\)

The logic of the court is reminiscent of the one employed in Deckmyn,\(^{436}\) where the CJEU extended the scope of the exception for parody in InfoSoc art. 5 (3) to ensure its effectiveness against the same argument for strict interpretation of copyright exceptions. Specifically because of the inherent relationship between the exception and the human right to freedom of expression. The PLR derogation similarly deals with a basic interest of the human rights in access to information. The effectiveness of this strong general interest in the cultural promotion by public libraries had to be ensured.

A second heavy argument for the court’s conclusion is the equivalence the court saw in a digital and a physical act of lending. As noted above the court demanded that the digital lending process had to adhere to the physical lending process in respect to one loan per copy, a time limited user period and an automatic end to the loan. The court concluded this process was essentially equivalent to the process of lending a physical copy of a book. The process of digital lending outlined had in the words of the court “essentially similar characteristics to the lending of printed works”.\(^{437}\) This is a clear correlation to UsedSoft, where the CJEU made the demand that the copy had to be left unusable at the time of a resale.

This is plain logic. What is protected by a right can be covered by the right and subject to its exceptions, what does not cannot. The insistence on a strict technical equivalence between a digital and physical act of lending restricts the application of the PLR derogation considerably in view of the possibilities of new technology. Something libraries see as a general problem with license models for digital lending.\(^{438}\) The court as such extends the PLR derogation to cover digital lending, but limits it in application to acts equivalent to a physical act of lending. This extends the prominent activity of public libraries to the digital sphere. It does however

\(^{434}\) C-174/15 para. 50

\(^{435}\) C-174/15 para. 51

\(^{436}\) C-201/13

\(^{437}\) C-174/15 para. 53

\(^{438}\) EBLIDA(2014), p. 11
not extend its application further into the remit of commercial disseminators than it does for physical copies.

As in UsedSoft the court does not directly address the prevalent view on the different qualities digital copies, that they as opposed to physical copies are non-degradable and allows for perfect reproductions, copies in any depth. Nor does it address any added risk of piracy digital lending can be seen to entail. I address these issues in a bit more depth below in part 6.3.

In general, the system of the judgement is interesting. Question one deals with potential reasons for exclusion for the directive to cover digital lending. It is therefore clear that the interpretative sources employed in relation to question two are the courts arguments for extending the scope of the lending right and PLR system also to digital copies. The courts argument is that the interest of cultural promotion, by extension the human right of access to information, and the basic technical equality of the physical and digital lending acts means that the lending right and PLR derogation should apply also digitally.

4.2.3.4 The other referred questions

The referring court asked three additional questions. They all related to what conditions the Member States can make on the application of art. 6 (1) of the Rental and Lending Directive.

The second question addressed whether the application of the PLR derogation could be made “subject to the condition” that the copy lent has been subject to a first sale and as such exhaustion. The court answered that in the affirmative. In reaching its conclusion the court relied on the demand for protection of authors in the public lending process in rec. 14 of the Rental and Lending Directive and the general demand of a high level of protection for copyright in EU law. It also referred to the Advocate General’s argument that where lending was done without approval it might in some cases prejudice the legitimate interests of authors. The demand that a copy meant for lending had been subject to a first sale was seen to minimize this risk.

It is clear that InfoSoc art. 4 (2) on exhaustion of the distribution right cannot directly influence the interpretation of art. 6 (1), as the lending right is expressly not subject to exhaustion. But the court makes it clear that the Member States are allowed to protect authors beyond the “minimum threshold of protection” established in art. 6 (1) when appropriate.
The conclusion as a new potential condition for the PLR derogation that the copy in question has been subject to exhaustion. The conclusion is interesting, as some see the distribution right and the lending right as intimately associated.\textsuperscript{446} It is clear that a library must normally have bought a copy it wishes to lend. It is important to note that the Rental and Lending Directive makes no such distinction. The reasoning is also peculiar in light of the discussion on the distribution right and the exhaustion principle above. If we assume that distribution does not apply to digital dissemination, as many argue, how can the exhaustion of the distribution right be a condition for the digital application of the PLR derogation? The CJEU therefore seems to follow the line established by the same court in UsedSoft, and to accept the function of this right and exception also in the digital environment.

In response to the third referred question, the court also determined the application of art 6 (1) “precludes the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an unlawful source.”\textsuperscript{447}

The court noted that the wording of art. 6 (1) makes no distinction as to the source of the work. Rec. 2 of the directive however states that an objective with the directive is to combat piracy, and allowing the lending of copies from unlawful sources would exactly tolerate and encourage piracy. The court finds further support for that interpretation in a contextual reading of the private copying exception in the InfoSoc-directive, which the court has held does not extend to copies form unlawful sources.

It is obvious that the lending of copies from unlawful sources would run counter to the entire system of copyright law, whether art. 6 (1) specifically makes the distinction or not.

The court did not answer the fourth question, which dealt with digital exhaustion in the InfoSoc-directive, as it felt the fourth question “was submitted only in the event of a negative answer to the second question.”\textsuperscript{448}

From the outside, it cannot help but feel like a lost opportunity for the court to clarify a very topical issue, but the question was obviously not central to the issue of the case referred. It can also be considered that the court went some way to answering the question in the positive, by its reference to its positive answer to question two.

\textsuperscript{446} Sganga(2016), p. 11
\textsuperscript{447} C-174/15 para. 72
\textsuperscript{448} C-174/15 para. 73
4.3 Lending of other categories of copyright protected works

The Vereniging Openbare Bibliotheken-judgement explicitly dealt with the exclusive lending right and the PLR derogation for “a digital copy of a book”\(^{449}\). It is therefore a question whether the conclusion in the judgment applies also to other digital subject matter.

The Rental and Lending Directive art. 1 establish “a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).”\(^{450}\) According to article 3 (1) the directive covers copyright protected works of authors, and a list of related rights holders. These are performers in relation to the fixation of their performances, phonogram producers in relation to their phonograms and film producers to copies of films.\(^{451}\)

The use of the term works must in principle include all works that can be protected as subject matter of copyright by the Berne Convention.\(^{452}\) Namely, “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”\(^{453}\). The CJEU has held in relation to the InfoSoc directive that a work is “subject-matter which is original in the sense that it is its author’s own intellectual creation”.\(^{454}\) All intellectual creations of an author must then be covered by the term. The protection of the Rental and Lending Directive must therefore be generally applicable to all works.

In the judgement, the CJEU itself formulates the question of the application of the directive generally: “[i]n those circumstances, it is appropriate, first of all, to examine whether that are grounds to justify the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of Directive 2006/115.”\(^{455}\) On the other hand, the court’s understanding of the first question and its conclusion specifically refer to “a digital copy of a book”.\(^{456}\) As the court has not made an unequivocal statement on the matter, my view is that the conclusion of the court must be considered generally applicable.

There is one potential exception. In the judgment the court note the statement by the Commission in the Explanatory Memorandum to the Rental and Lending Directive the European Commission stated its “desire to exclude the making available by way of electronic data transmission from the scope of Directive 92/100.”\(^{457}\) Although it considered it “related exclu-

\(^{449}\) C-174/15 para. 27
\(^{450}\) Rental and Lending Directive art. 1 (1)
\(^{451}\) Rental and Lending Directive art. 3 (1) b-d
\(^{452}\) Von Lewinski and Walter(ed.)(2010), p. 277
\(^{453}\) Berne Convention art. 2 (1)
\(^{454}\) C-393/09 para. 45
\(^{455}\) C-174/15 para. 30
\(^{456}\) C-174/15 para. 27 and 54
\(^{457}\) C-174/15 para. 41
sively to the electronic transmission of films”, and questioned its general relevance as it found “no direct expression in the actual text of the proposal.”

That the Commission had not taken into account future digital lending of other subject matter seems clear. To me it also seems clear that the statement only refers to simultaneous acts of communication. The degree the court accepted the statement can also be questioned. It does however leave the question whether the court would have come to a different if the subject matter had been “films” unanswered. To the degree the statement should be given weight, it should only be given so in relation to “films”, and I do not consider that the court has taken any firm position on the matter.

The important point, as argued by the court, is that the subject matter plays a part in the cultural promotion of libraries. To me it seems rather arbitrary that subject matter that is covered by the Rental and Lending Directive should not be able to form basis for the cultural promotion of libraries.

4.4 The questions not addressed by the court: The specter at the feast?

4.4.1 Introduction

As in relation to digital distribution the additional issues of the reproduction right, contract terms and technological measures are relevant in the context digital lending. They were largely untreated in the Vereniging Openbare Bibliotheken-judgment.

4.4.2 Digital lending and the reproduction right

Reproductions are a necessary part of a digital dissemination process, and consequently of a process of digital lending. It is therefore a topical issue whether these reproductions require the authorization of the copyright holder also for acts of digital lending subject to the PLR derogation.

As established above, the reproduction right is an additional exclusive right to the exclusive rights to distribution and lending established in the InfoSoc-directive. It is not subject to the exhaustion, but the exhaustive list of exceptions in InfoSoc art. 5.

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458 C-174/15 para. 42
459 C-174/15 para. 43
460 See the discussion above in 4.2.3.4
461 C-174/15 para. 51
462 InfoSoc art. 2 (1); See part. 2.6
463 InfoSoc rec. 32
The process of digital lending arguably necessitates two acts of reproduction. According to the CJEU a digital act of lending “is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer”.464 Both the upload to the server and the download to the computer amount to an act of reproduction.

This raises two questions: Are the necessary reproductions as part of the digital lending process covered by the PLR derogation? And, if not, are there any applicable exceptions in InfoSoc art. 5?

4.4.2.1 Reproduction as part of the PLR derogation

In Vereniging Openbare Bibliotheeken, the CJEU defines the digital lending process as follows: “by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer”.465

This is how the CJEU define an act of digital lending, and consequently the concept of digital lending covered by the Rental and Lending Directive, the lending right and PLR derogation. The necessary reproductions to carry out an act of digital lending then seems covered by the concept of lending of the Rental and Lending Directive. The application of the PLR derogation will therefore also apply to the necessary reproductions as part of the digital lending process.

It is true that the reproduction right is established separately in art. 2 of the InfoSoc-direc
tive and that it is in principle only subject to the exhaustive list of exceptions in art. 5.466 On the other hand, the RLD is lex specialis in relation to the InfoSoc-direc
tive.467 If both directives cover the necessary reproductions as part of the lending process, the protection of the Rental and Lending Directive must prevail with its applicable exceptions.

The necessary reproductions as part of the digital lending process does therefore arguably not require the authorization of the copyright holder.

4.4.2.2 Other applicable exceptions

If the above logic does not prevail, the necessary reproductions as part of the lending process would either require the authorization of the copyright holder or be subject to an exception to the reproduction right.

The CJEU did not directly address the issue of necessary reproductions as part of the digital lending process, but the Advocate General did in his Opinion.468 The court might therefore

464 C-174/15 para. 54
465 C-174/15 para. 54
466 InfoSoc rec. 32
467 InfoSoc art. 1 (2)
468 Advocate General opinion on C-174/15 para. 56-58
have been leaning on the reasoning of this Opinion in not addressing the reproduction issue. This is not unusual, as the Advocate General normally makes a more in depth treatment of the case for the benefit of the court.\textsuperscript{469}

The Advocate General argued for the applicability of InfoSoc art 5 (1), on transient and incidental reproductions, and art. 5 (2) c, specific acts of reproductions by libraries.

Art. 5 (1) exempts temporary acts of reproductions that are transient and incidental, an integral part of the technological process, which allows transmission between third parties or lawful use with no independent economic significance. The Advocate General argued that the local reproduction made by the lender was transient and incidental part of a technological process, the download.\textsuperscript{470}

An act of reproduction is incidental if it “neither exist independently of, nor have a purpose independent of, the technological process at issue”.\textsuperscript{471} The technological process at issue, as defined by the Advocate General, is the download made by the lender, but the book is available throughout the lending period. The download of a copy by the lender could therefore in my opinion not be considered incidental.

The reproduction right also covers transient copies.\textsuperscript{472} A transient reproduction is limited “to what is necessary for the proper functioning of the technological process used”.\textsuperscript{473}

The lent copy will exist throughout the lending period, beyond the technological act of reproduction, the download. If you consider the lending process as a whole the technological process in question, the reproduced copy could be considered necessary for that process.

The term transient has however been understood to cover acts of “particularly short duration”,\textsuperscript{474} such as browsing and caching.\textsuperscript{475} A lending period that goes on for weeks can then hardly be considered transient in the sense of art. 5 (1)

It is therefore hard to argue that art. 5 (1) as understood by the CJEU would be applicable to acts of digital lending.

InfoSoc art. 5 (2) c makes an exception for “specific acts of reproduction made by publicly accessible libraries (…) which are not for direct or indirect economic or commercial advantage”.

The Advocate General also argued that art. 5 (2) c could cover the reproductions made by libraries to put a digital copy of a book on a server of the library.\textsuperscript{476} He refers to the judgment

\textsuperscript{469} Craig and De Búrca(2015), p. 61
\textsuperscript{470} Advocate General opinion on C-174/15 para. 58
\textsuperscript{471} C-360/13 para. 50
\textsuperscript{472} InfoSoc art. 2
\textsuperscript{473} C-360/13 para. 46
\textsuperscript{474} Von Lewinski and Walter(ed.)(2010), p. 1025
\textsuperscript{475} InfoSoc rec. 33
\textsuperscript{476} Advocate General opinion on C-174/15 para. 57
of the CJEU in Technische Universität Darmstadt,\(^{477}\) where the CJEU was asked whether InfoSoc art. 5 (3) n could exempt digitalization of works to make them available to the public by “dedicated terminals” on the premises of a library.\(^{478}\) The court concluded that art. 5 (3) n can cover the digitalization of works by libraries for the purpose of research and private study.\(^{479}\) The exception did not extend to digitization of the whole collection of a library.\(^{480}\) The Advocate General argues that art. 5 (2) c must be interpreted in the same way and apply to the acts of reproduction made by libraries in the lending process.\(^{481}\) Art. 5 (2) c however only allows exemption of “specific acts” of reproductions. Rec. 40 makes it clear that that exception “should be limited to certain special cases covered by the reproduction right” and “should not cover uses made in the context of on-line delivery of protected works or other subject-matter.” It is unlikely that the term specific acts could apply to the full-blown lending activity of a library, and digital lending is obviously online delivery.

Another argument that can be raised by analogy from the Technische Universität Darmstadt-judgment\(^{482}\) is the application of the exception in art. 5 (2) b. It exempts reproductions made for “private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation”. The exception covers reproductions “made by a natural person”. The CJEU has however clarified that the exception also covers reproductions made “on behalf of a natural person”.\(^{483}\) The application of the exception requires that the copyright holder receive fair remuneration through a national remuneration system. The remuneration system can also cover private reproductions “made by a natural person by or with the aid of a device which belongs to a third party.”\(^{484}\) This arguably allows a lender to make a reproduction for private use, namely download a digital copy from a library server.

There is an extensive case law by the CJEU on the demands of the national remuneration system, which it is not possible to relay in detail here.\(^{485}\) In the recent VCAST-judgement\(^{486}\) the CJEU determined that an act of reproduction on behalf of a natural person and a consequent transfer of the work to that person also amounted to an additional act of making available in the sense of InfoSoc art. 3 which is not exempted by art.

\(^{477}\) C-117/13
\(^{478}\) C-117/13 para. 22
\(^{479}\) C-117/13 para. 49
\(^{480}\) C-117/13 para. 45
\(^{481}\) Advocate General opinion on C-174/15 para. 57
\(^{482}\) C-117/13
\(^{483}\) C-117/13 para. 55; Dreier and Hugenholtz(2016), p. 462
\(^{484}\) Copydan Bändkopi v Nokia Danmark A/S Case C-463/12 para. 91
\(^{485}\) For a comprehensive overview see Dreier and Hugenholtz(2016), p. 461-462
\(^{486}\) VCAST Limited v RTI SpA Case C-265/16
The case dealt with a service that offered recordings of live TV broadcasts and stored them for the user to access at a time and place chosen by him.\(^{488}\)

The act of dissemination in the lending process must however be considered an act of lending, and the PLR derogation apply. This does therefore not raise an issue in our case. The above means that the reproductions a part of the lending process may be covered by art. 5 (2) b, if they are not covered by the PLR derogation.

The private copying exception if applicable must still adhere to the three-step test in InfoSoc art. 5 (5). There are two opposing understandings of application of the three-step test in legal theory.

A restrictive approach rests on a decision by a WTO panel on the interpretation of the three-step test and is espoused by, among others, Mihaily Ficsor, a prominent drafter of the WCT and the Umbrella Solution.\(^{489}\) As a response to this restrictive approach, several leading academics on copyright law established an alternative in the so-called Munich-declaration.\(^{490}\)

The restrictive approach sees the three steps of the test as cumulative and equally necessary.\(^{491}\) The liberal approach sees the test as a comprehensive overall approach that looks to achieve an equitable balance of interests. Failing one step can be alleviated by the overall assessment.\(^{492}\)

The restrictive approach consider “certain special cases” clearly defined cases limited in its field of application, exceptional in scope and narrow both in a quantitative as a qualitative sense.\(^{493}\) The liberal approach consider it open ended and reasonably foreseeable. This allows court to apply exceptions by analogy or creating new ones in cases that merit such an approach.\(^{494}\)

The restrictive approach considers “conflict” as economic competition with the ways the right holder normally extract economic value from the work, that deprive the right holder from a significant or tangible economic gain.\(^{495}\) It considers “unreasonably prejudice” that which leads to or has the potential to cause an unreasonable loss of income for the copyright holder.\(^{496}\)

\(^{487}\) C-265/16 para. 40-49
\(^{488}\) C-265/16 para 14 and 15
\(^{489}\) WT/DS160/R; Ficsor(2012)
\(^{490}\) Geiger et. al.(2010)
\(^{491}\) WT/DS160/R para. 6.97
\(^{492}\) Geiger et. al.(2010), p. 119-120
\(^{493}\) WT/DS160/R para. 6.112
\(^{494}\) Geiger et. al.(2010), p. 121
\(^{495}\) WT/DS160/R para. 6.183
\(^{496}\) WT/DS160/R para. 6.229
The liberal approach does not consider that exceptions conflict or unreasonably prejudice when: they are based on important competing considerations, like the interests of creators and third parties, like the public; when they are based on human rights, competition law, or in case of strong societal interests “in scientific progress, cultural, social and economic development”; where adequate remuneration is ensured. Grifiths demonstrates how the courts of the EU Member States have taken divergent approaches to the application of the three-step test, and that the application varies from the restrictive to the liberal. The CJEU has understood the test as applicable by national courts, also on the specific facts of a case. The test should not affect the substantive content of the exceptions in art. 5, and neither extend or restrict their scope. On the specific steps of the test, the CJEU offer little guidance. The two judgments of the CJEU that address art. 5 (2) b and the three-step test at any length deals with respectively content from an unlawful source and the remuneration system. They are not strictly relevant in this context.

I will therefore only make a basic conclusion. The application of exceptions to allow digital lending in accordance with the three-step test would be unlikely in a restrictive approach, but quite possible in a liberal approach to the test. Both approaches are applied by national courts in Europe. The potential response of the CJEU does not seem altogether clear.

4.4.3 Contractual restrictions and technological protection measures

I dealt with the issues of contractual restrictions and technological protection measures in some depth above in part 3.6.2, I will therefore only deal with them shortly here. Contract terms precluding lending is a topical issue, as digital content is often disseminated on such terms. The European Bureau of Library, Information and Documentation (EBLIDA) has noted there are issues for libraries to “acquire e-books from legitimate sources”. EBLIDA mention Amazon as an example of a prominent supplier employing the practice of precluding lending by license terms. The availability of digital copies to lend is obviously a basic necessity for libraries to be able to lend books.

Above I established that the relationship between contract terms and copyright exceptions in general is considered unregulated in EU law. In my considerations this must mean that the

497 Geiger et. al.(2010), p. 121
498 Griffiths(2009), p. 3 ff
500 ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding Case C-435/12 para. 38
501 Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others. Case C-462/09 para. 22
502 EBLIDA(2017), p. 5
503 l.c.
issue is left up to the national legislator. Unless a stance has been taken by the legislator, the presumption must be that contracts are binding, *pacta sunt servanda*.

On the other hand, the CJEU in my opinion interpreted the effectiveness of the function of the exhaustion principle to deny the legal effect of such license terms UsedSoft.\footnote{C-128/11} Oracle had allowed the download of digital copy of a computer program with a license that granted “a non-exclusive non-transferable user right”. The effectiveness of the exhaustion principle meant that such license terms could not prevent a resale. Exhaustion has the effect that a copyright holder no longer can object to further transfer in the copy in question.\footnote{C-128/11 para. 49, 62 and 63}

You can extend the same argument to the PLR derogation. If the copyright holder or someone authorized by him can limit the derogation for public lending by a one sided license statement that would leave the derogation completely ineffective. I do not find it likely that the CJEU would accept an interpretation of the provision that would have that effect.

The competence nature of the PLR derogation could be argued as a basis for the opposite conclusion, as it specifically does not seek a large level of harmonization.\footnote{Dreier and Hugenholtz(2016), p. 293}

If the PLR derogation should be subject to license terms, lending despite contractual restrictions would require national regulation as EBLIDA solicit.\footnote{EBLIDA(2017), p. 5}

The use of technological measures issue is of equal importance in the context of digital lending as for distribution. Technological measures that hinder the reproduction of a digital copy of a book would make a digital act of lending impossible.

The circumvention of effective technological measures is prohibited in EU law.\footnote{InfoSoc art. 6} Member States must however, “in the absence of voluntary measures taken by the rightholders”, ensure circumvention for the beneficiaries of certain exceptions of art. 5.

Art. 6 (4) paragraph 2 grants Member States the competence to mandate circumvention for art. 5 (2) b, as discussed above, unless those reproductions has “already been made possible by rightholders”.

Technological measures will as such not necessarily be a hindrance for acts of digital lending, if the exception in InfoSoc art. 5 (2) b is applicable to that act. That is however, as we have seen above, not a straight forward. The article does not mandate circumvention for reproductions covered by the scope of the lending right. Circumvention in those cases would therefore in principle be prohibited.

It should be recalled that if we classify an act of digital lending as an act of making available any applicable exceptions from that act in art. 5 are additionally subject to license terms.\footnote{EBLIDA(2017), p. 5}
The classification of an act of digital dissemination is therefore central to whether the exceptions of art. 5 can effectively apply.

4.5 The de lege lata situation after Vereniging Openbare Bibliotheeken

The *de lege lata* situation after the Vereniging Openbare Bibliotheken-judgment at EU level is that the concept of lending of the Rental and Lending Directive covers the “lending of a digital copy of a book” in certain circumstances. The court qualified its conclusion by stating that digital lending would only be covered if it adhered to the concept of lending enshrined in the Directive. Substantially, a digital act of lending act must be equivalent to a physical act of lending. There must only be one loan per copy the library have in their collection at a time, the lending period must be time limited and end automatically, and the copy in question must be left unusable for the lender at the end of the lending period.

In my opinion, this conclusion must extend to all subject matter covered by the Rental and Lending Directive, with the potential exception of films.

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510 InfoSoc art. 6 (4) para. 4
511 C-174/15 para. 54
512 C-174/15 para. 54
4.6 A national perspective: Digital lending in Norway\footnote{This part is a shortened from a longer treatment, I hope to present a more in-depth consideration separately.}

4.6.1 Introduction

The CJEU delivered the Vereniging Openbare Bibliotheken-judgment on 10 November 2016. The way the different Member States will deal with the judgment is therefore an ongoing process. I will address the judgment in a national perspective, to look closer at its impact. As a Norwegian law student, I have chosen to look at the issue in the context of Norwegian law.

4.6.2 The pre-judgment legal situation

4.6.2.1 The EEA agreement

Norway is not a member of the EU and therefore not directly subject to EU law. Norway is a member of European Free Trade Association (EFTA) and the European Economic Area (EEA).

The EEA agreement is an international treaty and an association agreement\footnote{TFEU art. 217} between the EFTA countries Norway, Iceland and Liechtenstein, the EU and the EU Member States. It extends the internal market of the EU, including the four freedoms and common competition rules, to the three EFTA-members.\footnote{EEA agreement art. 1 (2)} The agreement cover EU legislation on copyright.\footnote{EEA agreement protocol 28} The “scope and objective” of the EEA agreement is less far reaching than the EU treaties, but goes beyond a normal international treaty.\footnote{Erla María Sveinbjörnsdóttir v Iceland E-09/97 para. 59} The EEA agreement included all acts of secondary legislation covered by the scope of the agreement and in force at the time of its enactment. New relevant acts of legislation are implemented through a simplified process, without requiring changes to agreement itself.\footnote{EEA Agreement art. 98; the Committee makes decisions by agreement, see art. 93 (2)} Abstention on implementation is theoretically possible, but has not been done in Norway.

The EFTA court is the EEA equivalent to the CJEU, with jurisdiction for the EFTA part of the EEA.\footnote{EEA agreement art. 108 (2); Surveillance and Court Agreement art. 27} The main objective of the EEA agreement “is to create a homogeneous EEA”.\footnote{L’Oréal Norge AS v Per Aarskog AS and Others Joined Cases E-9/07 and E-10/07 para. 27; also reflected in EEA agreement preamble rec. 4 and rec. 15; art. 1 (1) and Part VII Chapter 3 Section 1} The practice of the EFTA court must be in accordance with the rulings of the CJEU prior to the EEA agreement and must “pay due account” to the relevant rulings of the CJEU after this...
There is a presumption for equal interpretation of “provisions framed in the same way in the EEA Agreement and EC law”.

The EFTA court has made clear that the difference in “scope and purpose” of the EU and EEA systems “may under specific circumstances lead to a difference in interpretation between EEA law and EC law”. The EFTA court in most conceivable cases will not depart from the interpretation of the CJEU. The EFTA court has for instance accepted to change its previous interpretation after a new diverging interpretation by the CJEU of a provision in the Trademark Directive.

### 4.6.2.2 The Norwegian PLR system

The Norwegian PLR system is established in and outside the Norwegian legal regulation on copyright. The Norwegian PLR system establishes lending as an exclusive right, but limits this right by exhaustion and establishes a remuneration system outside the remit of copyright law.

The Norwegian Copyright Act of 1961 is the primary source of copyright legislation in Norwegian law. The Norwegian Copyright Act section 2 (3) establishes the lending right as the exclusive right of the copyright holder, as part of a broad distribution right which cover traditional distribution, rental and lending.

This broad distribution right, including the exclusive right to lending, is subject to exhaustion, as established in section 19. Exhaustion applies at the time of a first sale and, if the work has previously been issued, at other transfers of ownership of a copy by the copyright holder or with his consent. The copy may then “be further distributed amongst the public”. Exhaustion is in general limited to the EEA area, but it is international for the lending right.

Norwegian law also establishes a PLR system, in bibliotekvederlagsloven (the Remuneration for Lending by Public Libraries Act). The PLR system consist of remuneration in the form of government grants. The system is based in national cultural policy. It aims to further Norwegian language and literature, and secure a basic livelihood for authors.

Above I established that PLR systems differ on the variables of right holders, types of media and libraries covered, and the system of remuneration.

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521 EEA agreement art. 6; The Surveillance and Court Agreement Art. 3 (3)
522 Joined Cases E-9/07 and E-10/07 para. 27
523 Joined Cases E-9/07 and E-10/07 para. 27
524 See Joined Cases E-9/07 and E-10/07; Haukeland Fredriksen and Mathisen(2014), p. 142 and 254
525 Lov om opphavsrett til åndsverk m.v. (åndsverkloven)
526 Åndsverkloven section 19 (1)
527 Lov 29. mai 1987 nr. 23 om bibliotekvederlag; note that the translation utilized is not official
528 Sønneland(2007) part IV
In the Norwegian PLR system, remuneration is paid annually by the Norwegian government to “[a]uthors of works disposed of for lending by public libraries”\textsuperscript{529} This means that all types of creators, all type of media and all libraries available to the public in principle are covered by the system. The system is non-copyright based and does not cover secondary copyright holders, whether from agreement or inheritance. The system has further not been extended to related rights holders as allowed by the Rental and Lending Directive\textsuperscript{530} The system covers all “works” published in Norway\textsuperscript{531} with the exception of digital copies of computer programs, which are exempted from the exhaustion of the lending right\textsuperscript{532} The National Library keeps statistics on scientific and academic libraries, school libraries and public libraries (folkebibliotek) for the calculation of remuneration\textsuperscript{533} These are the libraries effectively covered by the system. The Ministry of Culture has the competence to specify further libraries as included in the system\textsuperscript{534} This has not been used to my knowledge. The remuneration is paid collectively as an annual lump sum payment through the national budget by the Norwegian government. The Norwegian PLR system is copy based. Remuneration is calculated based on “a fixed rate per lending unit”\textsuperscript{535} A “lending unit” denotes “works published in Norway and available for lending at public libraries”\textsuperscript{536} This includes works available for reference on the library premises\textsuperscript{537} The National Library keeps the statistics on the number of lending units kept by public libraries\textsuperscript{538} The “fixed rate” is negotiated by the right holder organizations and the Ministry of Culture, and finally approved by the Norwegian Parliament\textsuperscript{539} If there is no agreement the matter is passed to the National Mediators’ Office, and in lieu of a compromise finally decided by the Norwegian Parliament\textsuperscript{540} The sum per copy was 2.5795 nok in 2017\textsuperscript{541}

\textsuperscript{529} Bibliotekvederlagsloven section 1
\textsuperscript{530} Sønneland(2007) part IV
\textsuperscript{531} Bibliotekvederlagsloven section 2 (2)
\textsuperscript{532} Åndsverkloven section 19 (2)
\textsuperscript{533} National Library, Statistikkrapportering
\textsuperscript{534} Ot.prp.nr.11 (1986-1987) p. 11
\textsuperscript{535} Bibliotekvederlagsloven section 2 (1)
\textsuperscript{536} Bibliotekvederlagsloven section 2 (2)
\textsuperscript{537} Sønneland(2007) part IV
\textsuperscript{538} National Library, statistikkrapportering
\textsuperscript{539} Bibliotekvederlagsloven section 3 (1); Sønneland(2007) part I
\textsuperscript{540} Ibid. part III
\textsuperscript{541} Norwegian Authors’ Union(2018)
The annual remuneration is “distributed to funds managed by the authors' organizations in question”. The funds can be disposed as “payments to individual authors” or to “the benefit of authors or for the benefit of objectives relating to the group of authors in question”. The funds are generally disposed as work- or travel-grants upon individual application. The Norwegian Authors’ Union, representing Norwegian fiction writers, as the one exception use part of the funds to remunerated authors individually.

The lending of movies is an exception, here an annual overall sum is negotiated by the Ministry of Culture, the Directors guild of Norway and the Norwegian Film Association. The sum is disposed to Norwegian film directors and workers.

There is no demand for membership in the different organizations to apply for remuneration. The statutes of the different funds will normally demand residency in Norway and the use of Norwegian or Sami language. A previously usual demand for Norwegian citizenship has been removed to not fall foul of the prohibition of discrimination on basis of nationality in the EEA agreement.

The view of the Norwegian legislator is that this system complies with EU law and the Rental and Lending Directive. The use of a broad distribution right, and application of exhaustion on the lending right both depart from the system of EU law. It is however considered that the system adheres to the substance of EU law, which is all that the implementation of directives require.

As previously covered, art. 6 of the Rental and Lending Directive allows you to derogate from the exclusive lending right set out in art. 1 (2) for “public lending, provided that at least authors obtain a remuneration for such lending”. The Member States can determine the level of remuneration on basis of their “cultural promotion objectives” which was the express aim of the Norwegian legislator. The system seems to adhere to the demands of art. 6 (1).

4.6.2.3 The lending of ebooks and other digital subject matter

It is important to note that the lending of digital copies of copyright protected works like ebooks are not covered by the Norwegian PLR system.

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542 Bibliotekvederlagsloven section 4 (1)
543 Bibliotekvederlagsloven section 4 (2)
544 Sønneland(2007)
545 Ibid. part IV
546 Sønneland(2007) part IV
547 l.c.
548 Ot.prp.nr.15 (1994-1995) p. 82
549 EEA agreement art. 7 b
550 Rental and Lending Directive art. 6 (1)
This can be seen intermittently in the wording of the Norwegian Copyright Act section 2, on the broad distribution right, and section 19, on the exhaustion of that right, apply to “eksemplar” (copies) of copyright protected works. In the wider context of the act, the exclusive right of “fremføring” (communication) includes broadcasting and other wire or wireless communication of the work to the public, including making a work available on demand. The preparatory works to the Norwegian Copyright Act makes clear that the distribution right and exhaustion principle does not apply in the digital context. It is explicitly stated that section 2 (2) a relates to the distribution of physical copies of a work and that acts of digital dissemination are classified as acts of “fremføring” (communication). The exhaustion principle does not apply in the case of online services.

This seems in line with the traditional pre-Usedsoft reading of the InfoSoc-directive, as illustrated by Rognstad. Norwegian copyright law traditionally considered that locally reproduced physical copies after a digital dissemination process could be subject to exhaustion. This position was abandoned to ensure Norwegian law adhered to the InfoSoc-directive. The lending of digital copies of copyright protected works like ebooks are therefore not subject to the PLR derogation in Norwegian law. The lending of ebooks is considered acts of communication in the sense of Norwegian copyright law, and therefore require the consent of the copyright holder through license or agreement.

In Norway authors will as a rule transfer the rights to publish a book and make it available to the public to the publisher, in return for payment of royalties, as part of the standard contracts between authors and publishers. It is therefore the consent of publishers, a secondary right holder, which is necessary to make digital lending possible.

These assumptions can be questioned on basis of the two cases I have dealt with above. I will address this further below. The above treatment reflects the historical stance on the issue in Norwegian copyright legislation.

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552 Åndsverkloven section 2(2) a
553 Åndsverkloven section 2 (2) c and 2 (3)
554 Ot.prp.nr.46 (2004-2005) p. 140
555 Ot.prp.nr.46 (2004-2005) p. 28
556 Rognstad(2009), p. 163
558 Ministry of Culture(2015b), p. 8-9
559 Andreassen(2006), p. 315
4.6.3 Current ebook lending by Norwegian libraries

Norwegian public libraries get access to books from two main sources. From a national purchase schemes (innkjøpsordningene) run by the Arts Council Norway and from individual or collective purchases the libraries make themselves.\(^\text{560}\)

The Arts Council Norway is "the main governmental operator for the implementation of Norwegian cultural policy" and "fully financed by the Ministry of Culture."\(^\text{561}\) It has six purchasing schemes for the collections of Norwegian public libraries: new Norwegian fiction books for adults; new Norwegian fiction books for children; new Norwegian non-fiction for adults; new translated literature; new Norwegian non-fiction for children; new Norwegian cartoons; new public cultural journals.\(^\text{562}\)

Ebooks were made a permanent part of the purchasing schemes in 2014,\(^\text{563}\) after trial program on that was meant to run from 2012 to 2015.\(^\text{564}\) The proportion of ebooks acquired are markedly lower than the number of physical books purchased, but will be evaluated on an ongoing basis.\(^\text{565}\) The ebooks are made available to libraries by digital licenses, which allow one simultaneous loan per license. The licenses last for five years.\(^\text{566}\)

Outside the purchase schemes libraries have to acquire additional ebooks or other subject matter themselves. Public libraries have mostly acquired licenses to ebooks collectively through regional consortiums, which then distributes the licenses to the individual libraries.\(^\text{567}\) These licenses would allow one loan per copy and were time limited, normally to three years.\(^\text{568}\)

In the currently effective “National strategy for libraries 2015–2018” the Norwegian Ministry of Culture instructed National Library to “recommend a model for the purchase and lending of e-books in dialogue with the Norwegian Publishers Association and other relevant actors”.\(^\text{569}\) I will address this further below.

\(^{560}\) Ministry of Culture(2015a), p. 20
\(^{561}\) Arts Council Norway, A short guide to Arts Council Norway
\(^{562}\) Arts Council Norway, Støtteordninger
\(^{563}\) Arts Council Norway(2016), p. 35
\(^{564}\) Ibid. p. 9
\(^{565}\) Arts Council Norway, Støtteordninger; Ministry of Culture(2015a), p. 21
\(^{566}\) Arts Council Norway, Støtteordninger
\(^{567}\) Ministry of Culture(2015b) p. 18
\(^{568}\) Ibid. p. 25
\(^{569}\) Ministry of Culture(2015b), p. 20
4.6.4 The legal developments

There are several current developments on digital lending in Norwegian law. Below I will address a proposed implementation of the Vereniging Openbare Bibliotheken-judgement in the new Norwegian copyright act, the recommended model for ebook lending of the National Library and the so-called Bookshelf-agreement.

4.6.4.1 The legislative solution: the new Norwegian Copyright Act

A new Norwegian Copyright Act is currently under consideration by the Family and Cultural Affairs committee in the Norwegian Parliament. The Norwegian Ministry of Culture made a proposal available for public consultation on March 27th 2016,\(^\text{570}\) and submitted the final proposal to the Norwegian parliament on April 7th 2017.\(^\text{571}\)

The proposed act aims to modernize and simplify the current Norwegian Copyright Act from 1961 to enhance its effectiveness and availability for users. In particular it looks to address the rapid development of digital technology.\(^\text{572}\)

In the proposal, the Government suggest an alteration in the understanding of the scope of the distribution right and exhaustion principle. In light of the Verenigen Openbare Bibliotheken-judgment, the government states it will “slightly” extend their interpretation to cover acts of digital lending within the limits established by the CJEU. Namely, one copy one loan, a time limited lending period that ends automatically and the assurance that the copy is left unusable at the end of the lending period.\(^\text{573}\)

The government finds support for their use of exhaustion on the lending right in the answer of the CJEU to question 2 in the judgment, which determined that the derogation for public lending could be made contingent on a transfer of ownership to the digital copy.\(^\text{574}\)

The stance is a bit odd in the context of the Government’s general denial of the application of the exhaustion principle to digital dissemination.\(^\text{575}\) How can you buy a digital copy, if a digital copy is not subject to exhaustion? This is one of several questions left open by the proposal.

In general, the suggestion can be criticized for a lack of substance. It leaves several central issues unresolved. For instance, there is no comment on how digital lending will function in the PLR system. Moreover, there is no comment on the technical specifics. These issues must clearly be addressed at a future date.

\(^{570}\) Ministry of Culture(2016a)  
\(^{571}\) Prop. 104 L (2016–2017)  
\(^{572}\) Ministry of Culture(2016a), p. 14  
\(^{573}\) Treatment based on Prop. 104 L (2016–2017) p. 127-128  
\(^{574}\) Prop. 104 L (2016–2017) p. 128, see C-174/15 para. 65  
\(^{575}\) Prop. 104 L (2016–2017) p. 122
The proposal was added after the Vereniging Openbare Bibliotheken-judgment. To the degree there has been consultation on the issue this will have been in light of the original consultation memo, which concluded in the negative on the possibility of digital lending.\(^{576}\) It is clear that legislative decisions of some magnitude would benefit from a broad consultation process. In my opinion, these facts does not in themselves disqualify the proposal. In the following, I will evaluate it on merit.

In that regard, I will assume that digital copies in library collections will be covered by the PLR system. This seems the natural reading of the suggestion. I further assume that the proposal is generally applicable to all digital subject matter, and not only ebooks. This is in line with what I consider the scope of the solution of the Vereniging Openbare Bibliotheken-judgment.\(^{577}\)

### 4.6.4.2 Conform interpretation and state liability

The Norwegian government are as shown above actively implementing the result of the Vereniging Openbare Bibliotheken-judgment in Norwegian law. If they had not done so, it would have been necessary to evaluate whether the solution of the court would have had to be applied in Norwegian law even without implementation on basis of the principle of conform interpretation\(^{578}\) and if a failure to do so could entail state liability.\(^{579}\)

Since these issues are not strictly topical in the view of the legislative solution proposed, I will not go into them any further here.

#### 4.6.4.3 The recommended model of the National Library

The National Library has developed proposed model for digital lending in cooperation with different the stakeholders, prominently producer and author groups.\(^{580}\) After an aborted publication in May 2016, the final proposed model was published in December 2016.\(^{581}\) The model came into effect in February 2018.\(^{582}\) The Ministry of Culture also recently gave the National Library the task to develop a similar model for audiobooks.\(^{583}\)

The recommended model establishes two categories of license models for the lending of ebooks in Norwegian public libraries. First, what I will call the “license model” on one loan one copy basis. An ebook is acquired through a license that allows a limited amount of loans

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\(^{576}\) Ministry of Culture(2016a) p. 164

\(^{577}\) See part 4.3

\(^{578}\) Karl K. Karlsson hf. v The Icelandic State Case E-4/01 para. 28; Rt. 2000 p. 1811 on p. 1827

\(^{579}\) E-09/97 para. 60; Rt 2005 p. 1365 para. 52

\(^{580}\) Ministry of Culture(2015a), p. 20

\(^{581}\) National Library, *Nasjonalbiblioteket anbefaler ny e-bok modell*

\(^{582}\) Klassekampen(2018)

\(^{583}\) l.c.
of that copy. It is suggested the licenses should be priced as paper books and give the right to 10 loans per license. A loan is counted towards the license when 10% of the pages of the ebook have been opened. The model further state that all public libraries, either separately or collectively, should be able to acquire licenses and inter-library loans shall be allowed.

Second, the proposed model establish a “click model”. The library pays the copyright holder for each loan, and there is no limitation to loans per copy. It is stated that all titles published by Norwegian publishers should be available as part of a click model two years after the titles are published. If a previously published paper book is later published as an ebook this is limited to one year. The “one loan one copy” is the sole effective model for the first two years after publication. The model is also the default for licenses after the two year limit. It up to the libraries to actively put licenses in the “click model”. The model suggest the price per loan should not go beyond 10% of the sale price of the ebook, to reflect the fall in value two years signify compared to newly published books.584

4.6.4.4 Streaming solutions – the Bookshelf agreement

An interesting sui generis Norwegian development for digital dissemination outside the strict scope of the lending right is the Bookshelf-agreement. The agreement is an initiative of the National library. It makes all books published in Norway up to and including year 2000 available by streaming to all Norwegian IP-addresses.

The agreement is an extended collective license agreement between the National Library and Kopinor,585 a collective management society for collective management organizations representing “copyright holders of published works [authors and publishers]”.586 The legal basis for the agreement is the Norwegian Copyright Act section 16a.

Remuneration is calculated by the number of pages of books made available. Authors due more than 800 Norwegian kroner (nok) are paid individually. Remuneration below this limit is distributed collectively. Right holders can retract their works from the service.587

4.6.5 Problems and solutions

4.6.5.1 Comparative approach: The different solutions

I see it as a valid basic assumption that the best regulatory solution for digital lending is the one that strikes the right balance between the interests of the different stakeholders and best mitigates the problems raised by the parties.

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584 Treatment based on National Library(2016)
585 National Library, Avtale om digital formidling av bøker (Bokhylla)
586 Kopinor, Representing authors and publishers
587 Kopinor, Individuelle vederlag; Kopinor(2012)
I believe the central considerations on digital lending lies in the interplay between the importance libraries sees in access to literature in libraries and the issues right holders see with lending undermining the commercial ebook market.\textsuperscript{588} Under this general heading you can classify the issues libraries generally have seen with prohibitive pricing, one sided license terms and frictions that limit the potential of digital technology, and the issues right holders see with potential piracy.\textsuperscript{589} Authors have an interest in that a fair level of author remuneration is maintained,\textsuperscript{590} but consider secure and fair remuneration is more important than its source.\textsuperscript{591} Libraries generally fear the lack of access to works will prevented them from carrying out their mandate to present literature, culture and science to the public without discrimination. In Norwegian law this aim is expressly stated in folkebibliotekloven (Norwegian Library Act) section 1. They also consider that the refusal of access from right holders for certain works may hinder them from making the decisions on what they offer to the public on library-scientific basis.\textsuperscript{592}

The problem with the proposed model of the National Library in this regard is that it is only advisory, and therefore not binding. It seems a clear hope that at least the click model will be general in application, but the model must still be used by the parties to become effective, and any right holder can in principle withhold his works.\textsuperscript{593}

One can also see potential problems with the availability of books in the legislative model. In principle, all content offered for sale gives rise to exhaustion. The right holders could refuse therefore not refuse to sell ebooks specifically to libraries. They would however have the option to only offer ebooks in streaming services that does not give rise to exhaustion, as discussed above.

Right holders might prohibit lending in license agreements upon a sale. In Norwegian law such contracts are considered binding, even if the exclusive right is exhausted. Their validity would however have to be considered in view of national contract law and competition law.\textsuperscript{594} Finally, technological protection measures can be introduced that hinder the necessary copyright relevant acts as part of lending. Circumvention of such measures for lending would generally be prohibited.\textsuperscript{595} Above I addressed whether InfoSoc art. 5 (2) b could be used exempt the reproductions made libraries in the lending process. InfoSoc art. 6 (4) gives the national

\textsuperscript{588} Ministry of Culture(2015b), p. 47
\textsuperscript{589} Sganga(2016), p. 6; EBLIDA(2014), p. 9-12
\textsuperscript{590} Sganga(2016), p. 7
\textsuperscript{591} Ministry of Culture(2015b), p. 50
\textsuperscript{592} EBLIDA(2014), p. 5-6
\textsuperscript{593} National Library(2017)
\textsuperscript{594} Rognstad(2009), p. 162-163
\textsuperscript{595} Åvl. section 53a (1) a
legislator the competence to introduce an exception from technological measures for art. 5 (2) b. This has not been done in Norway, aside from some narrow exceptions.596

In general, to the degree limitations on public lending are based on legal considerations and not the general availability of ebooks I doubt that they would be accepted by the legislator, and I believe solutions would be found at legislative level.

On the subject of prohibitive pricing, the central point is that the government pays for the PLR system over the general state budget. Libraries however have to pay for lending by license themselves. Library budgets are generally considered weak,597 and it would seems a prerequisite for the feasibility of the license models that library budgets are increased. Especially if lending in the future generally moves to digital content.

The issue of availability of digital content in libraries is intimately connected with the fear of the publishers that such lending might undermines the commercial market. The idea is that people will not buy ebooks if they can borrow them from a library.598

In this regard it should be remembered that the aim of public libraries in Norway is to offer culture and science for free to the whole population without discrimination.599 Some degree of competition must therefore be seen as inherent in the system.

The reality of an adverse impact from library lending on the commercial market has also been questioned. Libraries claim that lending leads to an increase in reading habits and can positively impact the commercial market.600 This has been backed up by some international studies.601 Libraries also claim ebook lending normalizes the medium and teaches people to use the necessary technology.602

In Norway the general view has been that there is some adverse impact of library lending on the commercial market. Evidence has been found of the effect libraries describe, but the adverse effect on sales is considered somewhat larger.603 It should be taken into account that the Norwegian ebook market is relatively young and unestablished.604 The adverse impact of lending might therefore have a divergent impact in Norway.

It is important to separate the click model from the license model and the legislative model. The latter two only offer one simultaneous loan per license/copy, while the former has no such limitations.

596 See åvl. section 53b (1) and 12; Rognstad(2009), p. 380
597 Ministry of Culture(2015b), p. 63
598 Ministry of Culture(2015b), p. 49
599 Norwegian Library Act section 1
600 EBLIDA(2014), p. 13
601 Pew Research Center(2012), see also Sganga(2016), p. 13-14
602 Ministry of Culture(2015b), p. 49
603 Ministry of Culture(2015b), p. 50-52
604 Ministry of Culture(2015b), p. 50-16
A lot of the fear of adverse impact on the commercial market seems directed at an unlimited click model. In a well known case from Sweden, the autobiography of Zlatan Ibrahimović was offered by libraries in an unlimited click model. The result was 50 000 loans in November 2011 alone, and a distinct impact on both library budgets and commercial sales. In this situation the adverse impact of library lending seem unequivocal, and one can perhaps question the merit of a click model on this basis.

The fear for an adverse impact on the commercial market has been a basis for introducing so-called frictions on library lending. The legislative model and the license model share the central characteristic that they only allow one simultaneous loan per copy/license. This is a basic friction, as digital technology sets no such limit. It does however seem justified. If libraries have an inexhaustible supply of digital copies, they become far more similar to commercial suppliers.

The license model is limited to ten consecutive loans per license, while this friction is not included in the legislative model. A digital copy does not degrade, as opposed to physical copies that do wear out. In the legislative model, a digital copy will essentially remain permanently in the collection of the library. To reduce each license to ten loans does however seem arbitrary. If the aim is to establish some equivalence, surely a physical copy last longer than ten loans on average?

Moreover, frictions of this kind have been generally criticized. They are seen to skew the focus of libraries in building their collection to popular titles to avoid paying for unused licenses.

There has been a general debate on whether libraries should focus on front-list and bestsellers in Norway, or on having broad collections more focused on back-list titles. Libraries must both be able to offer current titles that the public want to read, and ensure a broad offer of all types of culture and science. To stay up to date is part of the libraries mandate.

To my mind, the distinction is a bit artificial. Libraries should focus on building the collections based on library-scientific considerations, without specifically focusing on the commercial popularity of the books they lend. I doubt considerations made on that basis would lead to an overall focus on best-sellers. This does however also become an argument against a click model. Here any competition on popular titles will be intensified, as seen in the Zlatan example. In the legislative model and the licenses model any actual or potential competition will be more limited.

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605 Ministry of Culture(2015b), p. 61
606 I have however not found relevant statistics on this issue.
607 Ministry of Culture(2015b), p. 60
608 Ministry of Culture(2015b), p. 53-54
609 Norwegian Libraries Act Section 1
On piracy and authors remuneration, I see less differences in the two models. On piracy, the aim for all side should be to do what is possible to avoid piracy from their dissemination models, weighted against considerations of usability. Preventing lending when you accept the same risk for your own dissemination does however seem rather arbitrary.

The level of authors remuneration does not vary much in the two models, on the basis of the standard contracts that are in force to remunerate authors for sale of digital content and lending.\textsuperscript{610} In both models, a copy/license must be acquired. The difference largely comes down to the need to renew a license every 10 loans, or whether the author get a yearly sum for every copy through the PLR system.

One difference is that the PLR system is collective, with the exception of the Norwegian Authors’ Union as mentioned above, while the proposed model is individual. For popular authors the proposed model might therefore be preferable.

4.6.5.2 The merit of the proposed solutions

The legislative model offers more legal certainty in access to works, and lays less financial burden on limited budgets of libraries as the Government pays for the PLR model. This allows libraries and librarians to construct the library collections on basis of their academic competence, rather than commercial considerations. It might put publishers in a slightly worse position by not extending any friction on the volume of use, but these frictions have been seen to have unfortunate effects. Any financial loss compared to the proposed model will moreover only amount to the loss from lack of renewed licenses.

The legislative model does not open for lending in a click model. I find valid reasons to question the merits of a click model, in that it might compete unnecessarily with commercial suppliers and because it changes the traditional role of libraries. It is good to remember that library lending in relation to physical books necessarily is limited to one simultaneous loan per copy. Also it as perfectly possible to attempt to license such use separately.

The merit of the proposed model is that as an agreement it would normally be equitably implemented by the parties. The imposition of a legal model might seem harsh in comparison. The proposed model also opens the door to more technology specific forms of lending, with the click model, but limits this to works that are more than two years old.

It should be noted that in principle nothing hinders the two models from functioning in concurrence, but one will obviously be preferred for the one loan per copy/license lending.

For authors the two models differ little on substance, aside from those who would be due significant royalties. They might prefer remuneration fully on individual basis. For authors in general a collective remuneration might seem preferable.

\textsuperscript{610} Norwegian Publishers Association(2017); Norwegian Publishers Association(2013); compared to a current annual PLR remuneration of 2,5795 nok.
My view that the legal model is the best solution also stems from a general consideration. The proposed model necessarily relies on a basic assumption that the lending by public libraries is a pure copyright-based transaction. This assumption is contestable after the Vereniging Openbare Bibliotheken-judgment. It also goes against the public lending tradition in Norway, and jeopardizes some of the fundamental considerations of the PLR system. Namely, that public lending is not a copyright issue, but an issue of cultural promotion. The inclusion of the public lending of libraries in copyright makes public lending a pure market consideration.

Here I think a long term perspective is important. While digital lending might be a minor part of the functions of public libraries now, that might change in future. If digital lending is not included in the PLR system however, that means public lending in general will become a normal copyright transaction ruled by the interests of the market, where considerations for cultural promotion bear little to no weight.

Including ebooks into the larger PLR system therefore seems preferable, as it gives continuity to the legal solution chosen for lending and the considerations and interests it was built on. That does not mean the interests of publishers does not matter. If the lending of identical non-degradable copies does adversely affect the commercial market, this should be taken into account. It should however not question the general considerations behind the PLR system, as these in my opinion rests on as important general societal interests.

A solution to this might be to include a remuneration system also for publishers, which would award a yearly sum for as long as a library keeps a digital copy in its collections. That is however a consideration that should be made in light of national cultural promotion objectives, and the conclusion might be that publishers should not be covered as the system is not copyright based.

4.6.6 In conclusion: The future of digital public lending in Norway

Currently the lending of ebooks in Norway takes place outside the scope of the lending right and the derogation for public lending. The lending of ebooks as such can only take place by license from the copyright holder.

The National Library has negotiated a proposed model for these license agreements with the Norwegian Publishers Association, on request of the Norwegian Ministry of Culture. In the bill for the new Norwegian Copyright Act the Norwegian Government has additionally proposed making the lending of ebooks part of the Norwegian PLR system in the model of the Vereniging Openbare Bibliotheken-judgment.

The legislative proposal gives no details about its implementation. In my understanding, it will necessitate that also ebooks are made part of the PLR systems. The solution must also in my opinion extend to other digital subject matter, as both the Norwegian PLR system and the
solution in the Vereniging Openbare Bibliotheeken-judgment is general in application. As the solution gives few details much will have to be clarified in future.

In general, I find what I understand to be the substantial solution of the government of merit notwithstanding any criticism of the form in which it was presented. It maintains the role of cultural promotion objectives as the fundamental basis for public lending also in the digital context.

I hope the previous part despite its brevity has shown the many complications the application of CJEU judgments might face in national law, and the many interest groups and interests involved.
5 A comparative perspective: Digital dissemination in UsedSoft and Vereniging Openbare Bibliotheken

5.1 Introduction

I addressed the *de lege lata* position for respectively digital distribution and lending in part 3.4 and 4.5 above. In this part, I will look at the judgements I have dealt with on the two issues in a comparative perspective. I will address the similarities and differences in the two judgments. I will look at the interpretative sources relied on in the two judgments, to address whether they share an approach when dealing with the issue of digital dissemination. Further, I will shortly look at the stance of the two judgments on the market integration perspective, the Umbrella Solution, technical equivalence and the *balance of interests* perspective outlined in part 2 above.

5.2 The position of the CJEU on digital dissemination

There are both clear similarities and differences between the UsedSoft-judgement and the Vereniging Openbare Bibliotheken-judgement.

It is clear that the two cases deal with very different issues. The UsedSoft-judgment deals with a commercial resale, the Vereniging Openbare Bibliotheken-judgement the non-commercial lending by public libraries. Consequently, the court also bases its conclusion in the two judgments on different basic considerations: In UsedSoft the court considered it central not to extend copyright protection beyond its specific subject matter central. I have argued above that this is based on the rules of free movement in the EU internal market.\(^{611}\) In Vereniging Openbare Bibliotheken the court considered it central that the interests served by libraries in cultural promotion, which I have argued has a fundamental rights angle in the right to access to information.\(^{612}\)

The two judgments also in my consideration differ in an interesting way on the role of the reproduction right. The court deals with it as an additional exclusive right in UsedSoft,\(^ {613}\) but it appears to be seen as part of the primary exclusive right, lending, in Vereniging Openbare Bibliotheken.\(^ {614}\)

Despite these differences, the two cases do deal with the same fundamental issue: the application of exclusive rights of copyright law, which before the judgments was generally thought to

\(^{611}\) C-128/11 para. 62

\(^{612}\) C-174/15 para. 51

\(^{613}\) C-128/11 para. 73 ff

\(^{614}\) C-174/15 para. 54
not apply in the digital context, on acts of digital dissemination. They also address the same alternative legal basis: the exclusive rights to lending or distribution or the exclusive right to communication right and making available to the public. The consequence of this choice is, as shown, that different exceptions apply.

The interpretative conclusion also seems based on the same considerations. In both cases, a central consideration of the court seems to be that it does not see itself as precluded from reaching its conclusion by any clear source of law. This consideration is as shown above questionable, while legally defensible, in the context of the UsedSoft-judgment.

The interpretative approaches of the CJEU in the two judgments are strikingly similar. After evaluating the wording and context of the provisions of the two directives, the court relies on the same two central considerations in the two judgments.

First, the view that there is a basic technical equivalence\(^{615}\) between the digital and physical acts covered by the exclusive right in question.\(^{616}\) The court also uses this consideration to limit the scope of its conclusion, which only extends as far as its definition of the digital act it considers the exclusive right to cover. The use of technical equivalence by the court can be criticized, I will look at this further below in part 6. Further, the court centrally bases its conclusion on teleological considerations in both judgments. The court relies on the objective of the respective exceptions, a teleological interpretation in \textit{sensu strictu}, the consequences of the lack of application of those exceptions, a teleological interpretation in a consequence perspective, and the effectiveness of the exceptions in reaching its conclusion, the \textit{effet utile}.\(^{617}\)

The court relies prominently on the objective of market integration in UsedSoft, and the objective of cultural promotion in Verenigi ng Openbare Bibliotheken.

In both cases, the court concludes that the older regulation on distribution and lending can apply to acts of digital dissemination.

In doing so, the court departs from the Umbrella Solution, which considers all acts of digital dissemination as covered by the communication right or making available right.\(^{618}\) By its conclusion in UsedSoft the court also departs from a generally held view in copyright law that all digital dissemination must be classified as services, which cannot be subject to exhaustion.\(^{619}\)

Whether by this the court extends the scope of the freedom movement of goods rules to the digital or extends the logic of exhaustion to the freedom of movement of services is debatable.

The central point is that the court brakes any formalistic separation of the two freedoms.

As a basic conclusion, I believe that UsedSoft and Vereniging Openbare Bibliotheken are different examples of the CJEU utilizing the same approach. Above I have argued that the

\footnotesize
\begin{itemize}
  \item \(^{615}\) See part 2.4.3
  \item \(^{616}\) C-128/11 para. 61 and C-174/15 para. 52 and 53
  \item \(^{617}\) See C-128/11 para. 49, 62 and 63 and C-174/15 para. 50 and 51
  \item \(^{618}\) See part 2.2.1
  \item \(^{619}\) See part 2.2.2
\end{itemize}
court deals with the same basic issue, relies on the same interpretative sources and effectively reaches the same conclusion in the two judgments. While one should perhaps not conclude a distinct line of practice from two court cases, what we see in the two judgments is clearly a very similar approach of dealing with two related issues.

5.3 Striking the balance in copyright regulation

In my view, the position of the court fundamentally rests on the balance of interests perspective. While the awareness of the potential consequences of the opposite conclusion is clear in the two judgements. In UsedSoft the court states that “[t]o limit the application [of Software Directive art. 4 (2)] solely to copies of computer programs that are sold on a material medium […] go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned”. This would allow a right holder to oppose or demand remuneration for every resale. In Vereniging Openbare Bibliotheken the court clarifies that “[g]iven the importance of the public lending of digital books, and in order to safeguard both the effectiveness of the derogation for public lending […] and the contribution of that exception to cultural promotion” the application of the PLR exception on digital acts of lending should not be ruled out. This would leave libraries to rely on license agreements for lending, which may, as has been shown above, both prejudice libraries ability to lend digital content and the fair remuneration of authors.

In both cases, the court clearly feels that the non-application of the respective copyright exception does not strike the right balance of interests in copyright protection. It would either extend copyright protection of software beyond its specific subject matter or jeopardize the effectiveness of the derogation for public lending and the role of libraries as promoters of culture. The court has as such aimed to avoid these consequences by applying the provisions of law in question also on acts of digital dissemination.

In both cases, the court departs from the system of the Umbrella Solution as adapted in the WCT and the InfoSoc-directive. The result is a different balance of interests, more access for the public and less exclusivity for the copyright holder. The court must therefore see this balance of interest as more equitable than the one offered by the InfoSoc-directive. The two judgments could therefore be seen as examples of the CJEU reestablishing what it sees as an equitable balance of interests it must have felt was lacking in the previous interpretative regime.

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620 See part 2.2.3
621 C-128/11 para. 63
622 C-174/15 para. 51
In short, as long as it can justify it legally, the court will apply older copyright legislation in the digital context where it, in their opinion, strikes a better balance of interests. I see two potential conclusions from these considerations. In the opinion of the court, the InfoSoc-directive fails to hit the balance of interests copyright law seeks to attain, and the CJEU has at least in part aimed to alleviate this perceived unbalance. That CJEU has reached this conclusion on two distinctly different legal bases, exhaustion and public lending, underlines these points.
6 De lege ferenda considerations

6.1 Introduction

A *de lege ferenda* perspective addresses what is the best regulatory solution for an issue, outside the constraints of the *de lege lata* perspective. Above I addressed whether the *de lege lata* situation for digital dissemination in copyright sufficiently reflects the balance of interest that is inherent in copyright regulation. In a *de lege ferenda* perspective it is possible to address which solution would best reflect this balance of interests. I will first address potential issues with the two applicable solutions and then address what I consider the best regulatory solution for respectively digital distribution and digital lending.

6.2 The merits of Umbrella Solution as enshrined in EU law

The WCT was tailor made to deal with copyright in the digital environment.\(^{623}\) The InfoSoc directive implements the WCT and its Umbrella Solution into EU law.\(^{624}\) The system establishes a high level of protection. If we accept the premise that the distribution right and the lending right do not apply to acts of digital dissemination, the applicable rights are the right to communication and making available to the public\(^ {625}\) and the right to reproduction.\(^ {626}\) These rights are not exhausted, nor in the traditional understanding subject to the PLR derogation. In this system, every act of digital dissemination is an act of communication or making available and a reproduction and therefore subject to the exclusive right of the copyright holder unless an exception applies.

From these broad rights, there is an exhaustive list of applicable exceptions. The exceptions have been considered vague, confusing, obscure and have been narrowly construed. Their diverse implementation throughout the EU also means the InfoSoc directive has largely failed in its aim to harmonize EU copyright exceptions.\(^ {627}\) The one mandatory exception in art. 5 (1) only apply to transient or incidental reproductions in a technological process. All the other 19 exceptions are optional for the national legislator, and therefore not guaranteed to apply.

The exceptions are further subject to the three-step test. EU law, as opposed to international law, understands the principle as operational for national courts on the individual case facts.\(^ {628}\) This means that the level of copyright protection set by the national legislator can be under-

\(^{623}\) WCT preamble para. 2 and 3
\(^{624}\) InfoSoc rec. 5
\(^{625}\) InfoSoc art. 3
\(^{626}\) InfoSoc art. 2
\(^{627}\) Janssens(2009), p. 332-333
\(^{628}\) Arnold and Rosati(2015), p. 744
mined by a national court applying a narrow understanding of the three-step test as established in EU law.

The interpretation of the three-step test varies widely between the Member States, from the restrictive to the liberal.\(^{629}\) In one striking example, the Mullholland Drive-judgement, the French Supreme Court considered that the added risk of piracy in the digital environment and the significance of DVD-sales to the copyright industry meant digital application of the exception for private reproductions would by definition conflict with the normal exploitation of the work.\(^{630}\)

Further, technical protection measures that hinder unauthorized reproduction or use can be applied to copies of copyright protected works. These are protected from circumvention even when exceptions apply.\(^{631}\) The directive establishes that circumvention should be made possible for some of the exceptions in art. 5.\(^{632}\) The Member State should however only interfere in lieu of voluntary measures by the copyright holders. If the act of dissemination is an act of making available to the public, circumvention to the benefit of the referred exceptions is further subject to contract regulation.\(^{633}\)

The above factors seen together severely limit the application of InfoSoc art. 5, exceptions in the system of the InfoSoc-directive and the raises the level of copyright protection in EU law.\(^{634}\) In the case of an act of making available, the presumed applicable right for non-simultaneous digital dissemination, all copyright exceptions can be made inapplicable by a combination of the exhaustive list of exceptions, technical protection measures and contract terms. This establishes a system of potentially complete protection for the copyright holder with no effective applicable exceptions in copyright law.

This is a clear departure from the system of lending and distribution, which establish distinct exceptions from the respective rights in the exhaustion principle and PLR derogation. For acts of digital dissemination that are for all intents and purposes equivalent to acts of distribution or lending the difference in treatment of the digital and physical is significant.

### 6.3 The merit of the traditional exclusive rights in the digital context

In the previous part, I have attempted to outline what in my opinion amounts to considerable issues with the level of protection in the InfoSoc-directive and its impact on acts of digital

\(^{629}\) Griffiths(2009), p. 3-6

\(^{630}\) Griffiths(2009), p. 3

\(^{631}\) InfoSoc art. 6 (1)

\(^{632}\) InfoSoc art. 6 (4)

\(^{633}\) InfoSoc art. 6 (4) para. 3

\(^{634}\) Janssens(2009), p. 334
dissemination. Some questions can also be asked about the merits of applying the distribution right and the lending right with their respective exceptions to such acts.

The upwards harmonization or increased level of copyright protection in EU law have largely been justified by the transition to a digital economy.\textsuperscript{635} The added danger of copyright violations with the ease of reproducing digital copies and the lack of “wear and tear” to a digital copy were significant arguments for this development.\textsuperscript{636}

Both the exceptions I have discussed in this thesis, the exhaustion principle and the PLR derogation, predate most of the modern digital development. The process of digital dissemination differ as previously covered from a physical process of dissemination, as it happens through the creation of a new copy.

A digital copy also have different characteristics to a physical copy. A prominent quality of a physical copy is that it degrades with time. A used physical copy is therefore not the equivalent of a new physical copy. A digital copy on the other hand does not degrade and can be perfectly reproduced.\textsuperscript{637} The application of exhaustion on digital copies then arguably have divergent economic consequences than the application of exhaustion on physical copies. As will arguably a digital second hand market, which will resell copies equivalent to new copies. This consideration to a degree also extends to the lending of libraries, which must necessarily stop lending a physical copy when it is worn out.

In a parallel case to the UsedSoft-judgement in the US, Capitol Records v ReDigi,\textsuperscript{638} this consideration was a prominent argument against the application of the first sale doctrine, the US equivalent to the exhaustion principle on music files.\textsuperscript{639}

Digital copies of copyright protected works are also easy and cheap to reproduce and disseminate.\textsuperscript{640} This has facilitated mass-dissemination. Not only from one to another, but from one to many. This became the basis for a culture of widespread copyright violations on the internet, colloquially known as piracy. In its heyday, piracy grew to become an equal competitor to established commercial models.\textsuperscript{641} There is little doubt that the level of protection in the InfoSoc-directive was strongly influenced by the fear of such piracy.\textsuperscript{642}

It can argued digital lending and digital distribution leads to further access to copies of works, and consequently the possibility of additional unlicensed reproductions and mass dissemination. If further access means further danger for copyright violation that must obviously be

\begin{footnotes}
\item[635] Hugenholtz(2009), p. 17
\item[636] Savić(2015), p. 415
\item[637] United States Copyright Office(2001), Section III B 1a
\item[638] Capitol Records v ReDigi 2013 WL 1286134 (S.D.N.Y. Mar 30, 2013) (ReDigi)
\item[639] ReDigi p. 655-656
\item[640] United States Copyright Office(2001), Section III B 1a
\item[641] Geiger(2010), p. 2
\item[642] Janssens(2009), p. 333
\end{footnotes}
taken into consideration. There is no legitimate interest in access for unlicensed use.\textsuperscript{643} The aim of readdressing the balance of interests in the InfoSoc-directive is not to aid or allow unlicensed use, but to recognize the strong interests in legitimate use of copyright protected content also digitally.

\textbf{6.4 What solution does best reflect a balance of interests?}

Above I have address both perceived issues with the system of the InfoSoc-directive and the traditional rights and exceptions of copyright law. In this way, I have tried to mitigate any problem that might follow from focusing predominantly on one solution and consequently predominantly on the merits and failings of that solution.\textsuperscript{644} I believe this allows you to address the best regulatory solution for digital dissemination in a more equitable light.

In my opinion, on the evidence outlined above, the system of the InfoSoc-directive offers a too high level of copyright protection. The exceptions established are furthermore diffuse, interpreted narrowly and may be rendered ineffective by the application of technological measures. At the same time, the nature of dissemination of copyright protected material has certain characteristics in the digital environment that differ from physical dissemination.

The best regulatory solution must therefore be somewhere between the two. There are reasons to accept more access than the InfoSoc-directive allows, while having regard for how identical non-degradable copies and piracy might adversely affect primary and secondary right holders in the digital environment.

There are clearly two approaches to reforming the current system, reforming the system established in the InfoSoc-directive or applying the exceptions discussed in this thesis, the exhaustion principle and the PLR derogation. As the goal of either solution should be to establish the same balance of interests in protection and access, the choice of nomenclature is perhaps not of great substantive importance.

I will make the following considerations on the distribution right and the exhaustion principle for digital works. In the application of the distribution right digitally with the distinct limitation that any copy redistributed is made unusable at the time of the resale, most of the traditional arguments against digital exhaustion does not apply. The act is not endlessly repeatable, as was the argument in the freedom of movement theory.\textsuperscript{645} Moreover, the fact that a copy is disseminated in a different way, as prominently relied on by Ficsor, is not in and of itself very significant when the result is the same.\textsuperscript{646}

\textsuperscript{643} Geiger(2010), p. 9
\textsuperscript{644} In my view, some of the literature on the UsedSoft-judgment falls prey to this. See for instance, Moon(2013)
\textsuperscript{645} See part 2.2.2 above
\textsuperscript{646} See part. 2.2.1 above
That leaves us with the prominent arguments of perfect non-degradable second hand copies and the danger of piracy, as outlined above. The impact of both has been questioned in economic theory. Poort and Rognstad do not see a great market impact from the fact that digital copies does not degrade. They note that: a resale anticipated by the buyer can justify a higher prize; that copyright protected works are typically fast-selling and that their economic potential has a limited time span that a secondary market will struggle to threaten; that buyers prefer first hand markets for reasons of ensured quality and security. In economic theory, the adverse impact of potential piracy has also been closely scrutinized. Handke et.al. highlight that while most studies on piracy find an adverse impact, the sources normally disagree on whether a higher level of copyright is the best solution for alleviating it. Additionally, they consider that any adverse impact must at least be capable of a “reasonably accurate estimate” and that any general welfare gains to the population in access to culture must be taken into account in the calculation.

In my opinion, it should be assumed that perfect second hand copies and piracy can have an adverse impact on the interest of the copyright holder. Moreover, copyright protection has a rationale beyond the purely economic, in natural law consideration of reward for intellectual effort.

The historic impact of piracy on the copyright industry cannot be denied. In any case, to the degree there is such an impact, it obviously adversely impact right holders. The sources referenced above also allows for the potential of an adverse impact. Such an impact should however not be exaggerated and not be taken for granted. It should be able to establish a reasonably accurate estimate of the adverse effect for it to be taken into account.

The question then is: what difference in protection can the potential difference in consequences legitimate?

As the act of distribution is largely similar to an equivalent digital act subject to a forward and delete-solution, I do not think the difference in treatment should vary that widely. Poort and Rognstad raises an interesting suggestion. To allow exhaustion only for copies subject to technical protection measures. Such copies normally have some limitations in their functionality compared to copies that are not subject to such measures. This is an alternative to the UsedSoft-system, which introduces general exhaustion and allows for the use of technological protection measures. This could make copies that cannot be resold comparatively more attractive, and make the copies that can be resold relatively safe from piracy. The suggestion goes some way in mitigating any adverse impact of exhaustion on the copyright holder.

647 Poort and Rognstad(2018), p. 20-21
648 Handke et.al.(2008), p. 14
649 Geiger(2009), p. 33
650 See Geiger(2010), p. 2
651 Poort and Rognstad(2018), p. 21
In my opinion, there is one situation where there are particularly strong interests for the application of exhaustion on acts of digital dissemination. As exhaustion and competition rules are alternative and their results cumulative there are cases where the exclusive right remains, but relying on it amounts to a violation of competition rules.\textsuperscript{652} Where this is the case for an act of digital dissemination that share the central characteristics of an act of distribution, and the conditions for exhaustion are fulfilled, I see no strong arguments against exhaustion not applying. Here strong interests outside copyright speak for limiting the exclusive right.

I believe the considerations with regard to lending must be different, as distribution and lending do not rely on the same underlying interests. As Geiger highlights, in cases where access to copyright protected content rests on the strong interests associated with the human right to access to information,\textsuperscript{653} copyright protection must be strictly balanced against this right.\textsuperscript{654} In my opinion, even in cases where there is no violation of the human right this still represents a strong interest that must be taken into account in any attempt to find an equitable balance for the interests involved. I recall that the human right to property, which include intellectual property, can be limited on the basis of strong general societal interests.\textsuperscript{655}

Lending and the PLR systems deal with the strong public interested in the free and egalitarian dissemination of literature, science and culture by public libraries. This is as opposed to distribution, which deals solely with a commercial relationship between two private parties. The balance must therefore be different.\textsuperscript{656}

I made a consideration of the best regulatory solution for digital lending above in the context of Norwegian law. I retain the general considerations I outlined there also in an EU context. I believe it is generally important to observe the considerations behind the PLR system also in a digital context, to enable libraries to continue their role as cultural disseminators unhindered. The value of those arguments are however be tempered by the reality for public lending in many EU Member States. I recall that 4 EEA members have not established a PLR system, and that in some the systems are not functional, like the Spanish one, or does not ensure sufficient remuneration, like the Cypriote one.\textsuperscript{657} Extending the PLR derogation to the digital will therefore not necessarily have the same consequences in all countries as it would in Norway. It might not form part of a workable system that adhere to the conditions set by the CJEU, and remuneration for authors might be as “negligible” as in a copyright-based system.\textsuperscript{658}

\textsuperscript{652} Rognstad(2008), p. 429-430; Geiger et.al.(2010), p. 121
\textsuperscript{653} ECHR art. 10; CFREU art. 11
\textsuperscript{654} Geiger(2010), p. 5
\textsuperscript{655} ECHR protocol 1 art. 1; CFREU art. 17
\textsuperscript{656} Geiger(2010), p. 5
\textsuperscript{657} PLR International, \textit{PLR Schemes in development}
\textsuperscript{658} Sganga(2016), p. 14
In my view, the basic aim must still be the same, to ensure the continued free and egalitarian lending by public libraries to the population as a whole.

In this regard, I think the historical context is of importance. As Von Lewinski and Walter highlight, part of the reason for introducing the PLR derogation was to “guarantee” the continued lending of public libraries.\(^{659}\) It should be recalled that many Member States did not recognize a lending right before the Rental and Lending Directive, and that half of them resisted the introduction of an exclusive lending right. The PLR system was the compromise.\(^{660}\)

Not recognizing digital lending under the lending right is discarding this compromise. By classifying the acts in question as acts of communication to the public these Member States will have gone from a position of not recognizing a lending right to considering it a by-definition pure copyright consideration, reliant on the consent of the copyright holder.

Such a choice is also relevant in a pure consequence perspective. The PLR systems allows Member States to, one, foot the bill over the annual state budgets, two, not pay the full market price for public lending and, three, only directly remunerate the author. By leaving digital lending outside the PLR system you, one, put the bill for lending directly on the budget of the libraries, two, pay the price set for such lending by the market and, three, pay the remuneration to the copyright holder rather than the author.

The PLR systems must also be seen as a value in themselves. To allow the Member States the competence to establish PLR systems based on a remuneration right for the author is built on strong cultural policy considerations of free and equal access to literature, science and culture. This might also be ensured in a copyright system, but as seen in the Vereniging Openbare Bibliotheeken-judgment\(^ {661}\) from the Netherlands there are potential issues in this approach both for library lending and author remuneration. A copyright system for public lending very easily changes the basic way you think and approach public lending. Copyright considerations will always be at the most basic considerations of commercial market interests. This is inherent in the idea of the exclusivity of copyright protection, that the right holder gain and maximize remuneration by allowing or not allowing access to his exclusive content.

It is also debatable whether a PLR system negatively impact the economic interests of the copyright holder. Libraries are adamant and has found support in some international studies for the fact that they are an organic part of the copyright system that incentivizes further reading and use of culture and as such benefit the system also commercially.\(^ {662}\)

Interestingly, a study in Norway has found evidence for both in the case of ebooks. The study shows that the adverse effect of competition to commercial sources to some degree outweigh

\(^{659}\) Von Lewinski and Watler(ed.)(2010), p. 260 \\
\(^{660}\) Ibid. p. 260-261 \\
\(^{661}\) C-174/15 \\
the positive impact of strengthened reading habits for ebooks.\textsuperscript{663} It should be recalled that these numbers were found in the context of a nascent ebook market.

I do not find strong interests in the issues of identical non-degradable copies and piracy outlined above in the case of lending. Piracy is a general consideration for whoever offer copyright protected content, and it should therefore not be used to discriminate against only one disseminator. To the degree non-degradable copies have a differentiated impact in that they do not age, this will be in a long term perspective. The major part of the commercial gain from copyright is normally more of a short term consideration.\textsuperscript{664}

In general, I see very strong public interests in retaining the PLR system for public lending and no equally strong interest to the contrary. My view is therefore that the PLR systems should be extended also to the digital. I believe this considerations stands despite its obvious differentiated impact in the Member States. The important part is that the Member States retain the competence to choose to organize their PLR systems as they do today, also when enjoyment of culture moves into the digital sphere.

I only extend this consideration to lending in a one loan per copy model. Lending in a “click model” share far more characteristics with commercial dissemination, and can have a different economic impact.\textsuperscript{665} I therefore more readily agree that these modalities of lending should be considered copyright considerations.

I will end with two a basic general consideration. First, I question the merit of extending the reproduction to cover legitimate secondary exploitation, like distribution and lending. A broad reproduction right as a good tool against illegitimate use, but it is hard to see good reasons for its application on legitimate use. Last, on all the above, I will state that I think copyright has been seen too much in a vacuum. There are clear cases where the interests internal to copyright has allowed overbroad protection for the copyright holder with adverse effect on other interests. The aim must be to find an equitable balance, where the strong interests of all sides are taken into account. In this regard outside considerations like human rights, competition law and market integration rules can function as a limiting influence.

\textsuperscript{663} Ministry of Culture(2015b), p. 50-52
\textsuperscript{664} Poort and Rognstad(2018), p. 20-21
\textsuperscript{665} Ministry of Culture(2015b), p. 61
7 A look to the future: The context of the current EU legislative process on copyright in the digital age

The EU copyright framework is currently undergoing revision. Does this process of revision impact the current legal position of the digital dissemination, and specifically digital distribution and digital lending?

In this thesis I have mostly dealt with the impact of judgments by the CJEU-judgements on current EU legislation. At the same time, it is important to be aware that new secondary legislation is being enacted as part of the Commission’s Digital Single Market Strategy. The strategy has express objective to secure “[b]etter access to digital content” through “[a] modern, more European copyright framework”.666

The Commission have so far proposed five legislative measures as part of the Digital Single Market Strategy. These are three regulations and two directives,667 three of which are already in force.668

The legislative measures to introduce exceptions the copyright holder’s exclusive right to control access and use of his work. None of them directly addresses the issues of digital distribution or digital lending in their form proposed by the Commission. Moreover they do not directly address the system of the InfoSoc-directive and art. 5 in particular,669 the major issue of exception in EU law, as highlighted by Geiger and others.670

Dealing with the issue of digital lending has been proposed as an amendment to the report of the Legal Affairs Committee, which is the responsible European Parliament committee for the Digital Single Market-directive.671 The proposed directive is currently awaiting a first reading as part of the “ordinary legislative procedure”.672 The committee report is currently “Awaiting committee decision”.673

The proposed directive has been subject to criticism. Particularly the lack of scope of the proposal in a digital single market context has been pointed out, which proposals that has been included and the way the proposal weigh the interests of the different copyright stakeholders.674 Eleonora Rosati criticizes the choice of focus of the Commissions when proposing new secondary legislation, highlighting how the CJEU rather than the Commission deals with

668 Regulation 2017/1128/EU; Regulation 2017/1563/EU; Directive 2017/1564/EU
669 Sønneland(2016), p. 17
670 See for instance: Geiger(2010)
671 COM(2016) 593 final
672 TFEU art. 289
673 European Parliament, Procedure file
674 For a broad collection of interest group reactions to the proposed directive, see: Ars Technica(2016)
many of the most topical issues in EU copyright law.\textsuperscript{675} That criticism seems valid in view of the topical nature of the issues I have addressed in this thesis. An additional example of development of EU copyright law by the CJEU can be seen the at least five consecutive cases on “linking” that have inched towards a comprehensive theoretical approach.\textsuperscript{676}

It is beyond this thesis to make a general evaluation of the proposed copyright package. What is clear for the purposes of this thesis is that the Commission’s proposed copyright package neither directly addresses the issue of digital distribution, the issues of public lending nor the general issue of exceptions in the InfoSoc-directive. In both the specific cases I have dealt with recent practice by the CJEU show a lack of clarity in how to interpret the current EU legislation on the subjects. Arguably, that should have given the Commission sufficient reason to address them.

\textsuperscript{675} Trinity College Dublin(2016)
\textsuperscript{676} For the last example see Stichting Brein v. Jack Frederik Wullems Case C-527/15
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**Personal messages:**
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