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Editorial

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Hop on the Roller Coaster – New Hopes for Digital Exhaustion?

Non-fungible tokens (NFTs) have become one of the hottest buzzwords of the pandemic period. One of the most important judgments was handed down in March – but published only in June – 2022 in *Osbourne v Persons Unknown and Ozone* (see [2022] EWHC 1021 (Comm)). In para. 13 of the judgment, Pelling QC stated that '[t]here is clearly going to be an issue at some stage as to whether non-fungible tokens constitute property for the purposes of the law of England and Wales, but I am satisfied on the basis of the submissions made on behalf of the claimant that there is at least a realistically arguable case that such tokens are to be treated as property as a matter of English law'. While this is only a dictum and the judgment on the proprietary freezing injunction originates from an application made without notice (where the other parties were not actively involved in the proceedings), it is still the first judicial opinion that asserts the property nature of NFTs. Shortly after this, in *Janesh S/O Rajkumar v Unknown Person* ('*Chefpierre*'), the sale of certain NFTs was halted by an injunction of the Singapore High Court as well. This ruling is also claimed to confirm the property nature of NFTs under the law of Singapore.

No doubt, NFTs have brought fresh air to digital copyright law. They have inevitably led to copyright issues, ranging from unauthorized minting of third-party contents to contractual disputes. The proprietary protection of NFTs might also allow us to rethink 'thought-to-be-settled' copyright issues like the role and meaning of the doctrine of exhaustion in the digital domain.

Since the CJEU's *Tom Kabinet* judgment (Case C-263/18), we could easily believe that digital exhaustion is completely ruled out. This is far from the truth. Not only because the CJEU left various questions open, but also because the dynamic changes of technology, business, social reality and the law mean that nothing is set in stone and can change at a moment's notice.

The direction from which we look at digital exhaustion, the level of flexibility in the interpretation and application of statutes as well as the policy considerations that we treat as superior to others have commanding relevance for this doctrine. Unlike the CJEU, which followed a rather strict normative approach in *Tom Kabinet*, and much more like AG Szpunar, who presented all the major dimensions of the issue – policy, case law and normative aspects – in his Opinion, various starting points could support reconsidering digital exhaustion post-*Tom Kabinet*.

First, exhaustion has never been properly theorized. It is regularly called to be a limitation, an exception, an exclusion, an exemption, a restriction, an implied license, a doctrine or a principle. In the second edition of my monograph on copyright exhaustion (Péter Mezei: Copyright Exhaustion: Law and Policy in the United States and the European Union (Cambridge University Press 2022)), I argued that this concept represents a special limitation to the right of distribution. As such, it shall benefit from the doctrinal flexibilities developed by the CJEU related to other limitations and exceptions, especially the 'user rights' approach. This approach relies on the fundamental rights of end-users, e.g. freedom of expression, and it offers the effective application of such limitations against rights holders' exclusive rights.

Second, in its earlier preliminary ruling in *UsedSoft*, the CJEU changed the classification of a communication (or, more precisely, the making available) to the public into a distribution of a copy of protected subject-matter due to the transfer of ownership. Since the *UsedSoft* case was about the online sale of computer programs (or rather the license keys to them) governed by a special directive, the CJEU did not feel itself obliged to apply the same creative interpretation in *Tom Kabinet*, which was about e-books covered by the InfoSoc Directive. This differentiation has necessarily led to a sensible break in the objectivity and technological neutrality of copyright law.

Third, it might be a right approach not to focus on the limitations of exclusive rights but to minimize the scope of those rights so that *de minimis* or personal uses are excluded from the scope of economic rights. Such an approach was followed by the CJEU in *Svensson* (Case C-466/12), where hyperlinking was excluded from the scope of the communication to the public right due to the lack of new public. This judgment was applied consistently by the CJEU in *Tom Kabinet*, but it led to a counter-intuitive result. Unlike in the completely public scenario of hyperlinking, the exchange of individual e-books (also) occurred on a peer-to-peer (closed) basis in *Tom Kabinet*. The exclusion of the reliance on a secondary or inferior economic right (in fact, mainly the right of reproduction) would make a lot of sense in 21st century digital copyright law – still, courts are regularly reluctant to reach such a conclusion (compare to the *ReDigi* decision in the USA; see *Capitol Records, LLC v ReDigi Inc.*, 910 F.3d 649 (2018)). As a rare exception, in a case on royalties

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for making works available to the public via the internet, the Supreme Court of Canada decided on 15 July 2022 that payment is due only under one of the three economic rights under Sec. 3(1) of the Canadian Act, and that 'Distributing functionally equivalent works through old or new technology should engage the same copyright interests […]. For example, purchasing an album online should engage the same copyright interests, and attract the same quantum of royalties, as purchasing an album in a brick-and-mortar store since these methods of purchasing the copyrighted works are functionally equivalent. What matters is *what* the user receives, not *how* the user receives' (2022 SCC 30, para. [63], emphasis in the original).

Fourth, the underlying contractual stipulations shall be interpreted in a more balanced way. Just like in *UsedSoft* – and in various US court decisions – license agreements might be transformed into sales contracts. This way, acquirers' interests – including consumer protection warranties – could counterbalance licensors' broad terms and conditions, and misleading terminology could be evaded to support consumer expectations (and conformity). Alternatively, instead of verbal gymnastics with contract law, the default bifurcated approach of the EU on the contracts on goods or services could be supplemented by a third type of contracts on the 'online sale' of digital copies of protected subject-matter. Although this might necessitate the creative interpretation of property law, we already have the precedents for that. In *UsedSoft*, the CJEU declared intangible computer programs to be subject to transfer of ownership. Certain digital assets including cryptocurrencies might also be owned in various jurisdictions. In short, property and consumer law could play a greater role in digital copyright law.

Fifth, the EU has long applied the principle of technological neutrality in an inconsistent manner. This neutrality requirement was generally used in the EU to extend the scope of economic rights in the digital era, but limitations and exceptions have regularly been interpreted in a technologically biased manner. Consequently, there is a growing gap in EU law between the scope of exclusive rights and the limitations and exceptions to the unnecessary detriment of end-users. We know from Canadian law that technological neutrality is a proper way to keep copyright balanced. The same Canadian judgment cited above stressed that 'where a novel technology emerges that has no clear traditional equivalent […] courts must look at what that new technology does to the substance of the work by examining which, if any, of the copyright interests in Sec. 3(1) are engaged by this new method of distributing a work. If that new technology gives users durable copies of a work, the author's reproduction right is engaged. If the new technology gives users impermanent access to the work, the author's performance right is engaged' (2022 SCC 30, para. [70]).

This, coupled with the hype around streaming, leads to the extension of the scope of the communication to the public right to the detriment of, e.g. the right of distribution. At this point, we should put aside the economic realities of the 'streaming wars', that is, whether the constant growth of the user basis and the platforms' business models are sustainable at all. The key problem with the overemphasis of streaming is that it not only reflects (again) the instantaneous copyright realities of an ever-changing economic environment, but also limits the breathing space for external innovations (models coming from non-mainstream actors, e.g. start-ups). Consequently, it hinders the development of new business models, which are, ultimately, alternative ways to preserve and access culture. And this cannot be more visible than regarding blockchain, web 3.0 or the metaverse. These models are designed to eliminate (to a certain degree) the middlemen, allowing end-users to independently decide on their virtual assets in a way that echoes property interests. Furthermore, users of the blockchain system purposefully invest in tokens in the hope of returns upon the future disposal of those tokens. But if we treat a token that is a kind of authentication of certain interests encoded in the blockchain to be subject to ownership, how could we effectively argue that a digital file embodying the subject matter itself is not representing any proprietary interests?

While talking about digital exhaustion looks like a ride on a roller coaster (with ups and downs and sharp turns), it is a mentally fascinating tour of legal interpretation, systematic analysis, balancing and looking toward the future of copyright law. We quite often forget that the doctrine of exhaustion was the first concept to be accepted by the European Court of Justice. The *Deutsche Grammophon* judgment (Case C-78/70) ultimately sparked the need for a regional copyright system. As of now, there seems to be no similar plans to apply digital exhaustion in the recalibration of copyright law in the digital single market. NFTs and/or any other virtual property-focused technological and business developments (surrounded by non-negligible hype) might serve as the new hope to put exhaustion back in the mainstream of the future of copyright law.