

**A STUDY ON THE FIRST SALE DOCTRINE IN THE DIGITAL
ENVIRONMENT AND THE CHALLENGES TO COPYRIGHT
EXHAUSTION IN THE AGE OF ONLINE DISTRIBUTION**

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Submitted by

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DECLARATION

I declare that the Research Project entitled “ **A Study On The First Sale Doctrine In the Digital Environment And The Challenges To Copyright Exhaustion In The Age Of Online Distribution**” submitted by me for the degree of MASTER OF LAWS (LL.M) is the record of research work carried out by me under the guidance of Assistant Professor M.Jinesh and has not formed the basis or the award of any Degree, Diploma, Associateship, Fellowship, Titles in this university or any other similar University institutions of Higher Learning.

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LIST OF ABBREVIATIONS

1. **DRM** – Digital Rights Management
2. **TPM** – Technological Protection Measures
3. **WCT** – WIPO Copyright Treaty
4. **WPPT** – WIPO Performances and Phonograms Treaty
5. **TRIPS** – Agreement on Trade-Related Aspects of Intellectual Property Rights
6. **EU** – European Union
7. **CJEU** – Court of Justice of the European Union
8. **ECJ** – European Court of Justice
9. **US** – United States
10. **U.S.** – United States (Legal citation form)
11. **IP** – Intellectual Property
12. **ISP** – Internet Service Provider
13. **IT Act** – Information Technology Act, 2000 (India)
14. **Sec.** – Section
15. **Art.** – Article
16. **v.** – Versus (used in case law citations)
17. **No.** – Number
18. **Ltd.** – Limited
19. **Int'l** – International

CHAPTER - 1

A Study on the First Sale Doctrine in the Digital Environment and the Challenges to Copyright Exhaustion in the Age of Online Distribution

Introduction

The doctrine of first sale, commonly referred to as the principle of copyright exhaustion, constitutes one of the foundational doctrines of copyright law. It operates as a limitation on the exclusive distribution right of copyright holders by permitting the lawful purchaser of a copyrighted work to resell, lend, or otherwise dispose of that particular copy without seeking further authorization from the copyright owner. Historically, this doctrine emerged as a mechanism to balance competing interests—protecting the economic rights of authors and creators while simultaneously safeguarding the autonomy and expectations of consumers in a free market system. In the context of tangible goods such as books, compact discs, and DVDs, the doctrine has functioned with relative clarity and certainty, enabling the development of secondary markets including libraries, rental services, and second-hand sales.

However, the advent of the digital age has significantly disrupted the traditional understanding and application of the first sale doctrine. The proliferation of digital technologies and the expansion of online distribution platforms have transformed the manner in which copyrighted works are created, disseminated, and consumed. Digital goods—such as e-books, software programs, digital music files, and streaming content—are no longer transferred in the form of physical copies but are instead accessed through downloads, cloud-based services, or streaming mechanisms. This fundamental shift from ownership of a physical object to access under a contractual framework raises critical questions regarding the continued relevance and applicability of copyright exhaustion.

A key challenge arises from the legal characterization of digital transactions. Unlike traditional sales, many digital transactions are structured as licensing agreements, wherein users are granted limited rights to use the content rather than full ownership of a copy. These licensing models often include restrictive terms that prohibit resale, transfer, or sharing, thereby effectively circumventing the operation of the first sale doctrine. This creates a conceptual and legal tension: while consumers may perceive themselves as “owners” of digital content, the

law often treats them as mere licensees. Consequently, the doctrine's applicability in the digital environment becomes uncertain and contested.

In the Indian context, the doctrine of copyright exhaustion is recognized under the Copyright Act, 1957, primarily in relation to physical copies of works. Indian jurisprudence has addressed aspects of exhaustion, particularly in the context of parallel imports and distribution rights, but there remains a notable absence of explicit statutory provisions or judicial clarity concerning its application to digital goods. This legal ambiguity is further exacerbated by the increasing reliance on technological protection measures, such as Digital Rights Management (DRM) systems, which restrict copying, sharing, and transfer of digital content, often beyond the scope envisioned by traditional copyright law.

The transition to digital distribution also raises broader normative and policy concerns. It challenges the balance between copyright protection and user rights, particularly with respect to access to knowledge, competition, and innovation. If digital works are perpetually controlled through licensing and technological restrictions, the secondary markets that traditionally facilitated affordability and dissemination may be undermined. At the same time, weakening copyright protection in the digital sphere may adversely affect incentives for creators and right holders.

In light of these developments, it becomes imperative to critically examine whether the first sale doctrine can be meaningfully adapted to the digital environment. This requires an analysis not only of statutory provisions and judicial interpretations but also of evolving technological and commercial practices. The present study seeks to explore the conceptual foundations of the doctrine, assess its applicability to digital works, and identify the legal and practical challenges that arise in the context of online distribution. Furthermore, it aims to evaluate the adequacy of the existing Indian legal framework and to suggest possible reforms to ensure a more balanced and coherent approach to copyright exhaustion in the digital age.

Review Of Literature

I. Books

1. W.R. Cornish, David Llewelyn & Tanya Aplin (2019) – *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*

This book provides a comprehensive understanding of copyright law, including the principle of exhaustion of rights. The authors discuss how the first sale doctrine traditionally applies to tangible goods and highlight the challenges posed by digital distribution. It is particularly relevant in understanding how copyright law has evolved and the limitations of applying traditional doctrines to digital works.

2. Lionel Bently & Brad Sherman (2014) – *Intellectual Property Law*

Bently and Sherman explore the theoretical foundations of intellectual property, including the balance between creators' rights and public access. The book critically analyses copyright exhaustion and explains how digital technologies complicate ownership concepts. This work is useful for examining the conceptual issues surrounding licensing versus ownership in digital content.

3. N.S. Gopalakrishnan & T.G. Agitha (2017) – *Principles of Intellectual Property*

This book focuses on Indian intellectual property law and provides insights into the Copyright Act, 1957. The authors discuss the doctrine of exhaustion in the Indian context, particularly with respect to distribution rights. It is highly relevant for analysing the gaps in Indian law concerning digital copyright exhaustion.

4. P. Narayanan (2017) – *Copyright and Industrial Designs*

Narayanan's work is a leading commentary on Indian copyright law. It explains the statutory framework governing copyright, including the concept of exhaustion and its judicial interpretation. The book is particularly useful for understanding how Indian courts have approached copyright issues and the absence of clarity regarding digital goods.

5. Neil Weinstock Netanel (2008) – *Copyright’s Paradox*

Netanel examines the tension between copyright protection and democratic access to information. The book discusses how strong copyright regimes may restrict access, especially in digital environments. This perspective is important for evaluating whether limiting the first sale doctrine in digital contexts affects public access and freedom of information.

6. Lawrence Lessig (2006) – *Code: Version 2.0*

Lessig analyses how technology, particularly code and digital architecture, regulates user behaviour. He explains how technological protection measures such as DRM can override legal doctrines like the first sale doctrine. This work is highly relevant in understanding how law and technology interact in digital copyright regulation.

II. Journal Articles

1. Aaron Perzanowski & Jason Schultz (2011) – “Digital Exhaustion”

This article examines whether the first sale doctrine should apply to digital goods. The authors argue that digital transactions blur the distinction between sale and license, often disadvantaging consumers. The article is directly relevant as it addresses the core issue of copyright exhaustion in digital environments.

2. R. Anthony Reese (2003) – “The First Sale Doctrine in the Era of Digital Networks”

Reese analyses how digital distribution challenges the traditional application of the first sale doctrine. He highlights issues such as perfect reproduction and the absence of physical transfer. This article is useful in understanding the technological barriers to applying exhaustion in digital contexts.

3. Julie E. Cohen (2003) – “Copyright and the Perfect Curve”

Cohen discusses how digital technologies enable perfect copying and control, which complicates traditional copyright doctrines. She argues that excessive control by copyright holders may undermine user rights. This article is relevant for analysing the imbalance between rights holders and consumers in digital markets.

4. Niva Elkin-Koren (2010) – “Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic”

This article examines the role of intermediaries and technological control in digital copyright enforcement. It is relevant to the dissertation as it highlights how digital ecosystems influence copyright enforcement and limit the applicability of traditional doctrines.

5. Pamela Samuelson (2016) – “Legally Speaking: Digital Exhaustion”

Samuelson explores the possibility of extending exhaustion principles to digital goods. She analyses legal developments and suggests that adapting the doctrine is necessary to maintain balance in copyright law. This article provides valuable insights into potential legal reforms.

6. Susy Frankel (2012) – “The Exhaustion Doctrine in the Digital Age”

Frankel discusses how exhaustion operates differently across jurisdictions and the challenges posed by digital goods. The article is useful for comparative analysis and understanding global perspectives on digital copyright exhaustion.

7. N.S. Gopalakrishnan (2015) – “Copyright Law in India: Emerging Challenges in the Digital Era”

This article focuses on the Indian legal framework and its response to digital copyright issues. It highlights the lack of clarity regarding digital exhaustion in India. This is particularly relevant for evaluating the adequacy of Indian copyright law.

Research gap:

The first sale doctrine and the principle of copyright exhaustion are well developed in relation to physical copies of copyrighted works. However, their application to digital content distributed through online platforms remains uncertain and legally contested. Most existing studies focus either on traditional physical markets or on a few foreign judicial decisions, without offering a comprehensive analysis of how copyright exhaustion should operate in the digital environment. The widespread use of licensing models, streaming services, and digital downloads has further blurred the distinction between ownership and access, creating new legal challenges that are not adequately addressed in current scholarship. There is therefore a clear

gap in examining how the first sale doctrine can be applied to digital works and whether the present legal framework is sufficient to deal with the realities of online distribution.

Research Objectives

The objectives of this study are:

1. To examine the concept and development of the first sale doctrine and the principle of copyright exhaustion under copyright law.
2. To analyse the impact of digital technology and online distribution on the traditional understanding of the first sale doctrine.
3. To study the legal position in India regarding copyright exhaustion in relation to digital works.
4. To identify the legal and practical challenges in applying the first sale doctrine to digital content such as e-books, software, and online media.
5. To evaluate whether the existing legal framework adequately balances the rights of copyright owners and the interests of users in the digital environment.
6. To undertake a comparative analysis of the first sale doctrine and the principle of copyright exhaustion in selected foreign jurisdictions and examine how different legal systems address the challenges posed by digital distribution.

Research Questions

1. What is the meaning and scope of the first sale doctrine and the principle of copyright exhaustion under copyright law?
2. How has the growth of digital technology and online distribution affected the traditional application of the first sale doctrine?
3. What is the present legal position in India regarding copyright exhaustion in relation to digital works?
4. What are the main legal and practical challenges in applying the first sale doctrine to digital content such as e-books, software, and online media?
5. Does the existing legal framework in India adequately balance the rights of copyright owners and the interests of users in the digital environment?

6. How have other jurisdictions addressed the application of the first sale doctrine and copyright exhaustion in the digital environment, and what lessons can India draw from their approaches?

Hypothesis

The traditional first sale doctrine is not fully suited to the digital environment, and its application to online distribution creates significant challenges to the principle of copyright exhaustion.

The existing Indian copyright law and judicial approach do not provide clear or adequate guidance on the application of the first sale doctrine to digital works, resulting in legal uncertainty for both copyright owners and users.

Research Methodology

This study uses a doctrinal method of legal research. It analyses statutes, case law, and scholarly writings on the first sale doctrine and copyright exhaustion. Secondary sources, including books, journal articles, and reports, are also consulted to understand challenges in the digital environment. A comparative approach is used where needed to examine developments in other jurisdictions. The study is descriptive and analytical, focusing on evaluating whether the existing legal framework effectively addresses issues arising from online distribution of digital works. No empirical research is conducted; the study relies entirely on library and online legal sources.

Limitations of the Study

1. This study is primarily doctrinal and relies on existing statutes, case laws, and secondary sources. No empirical research or field surveys are conducted.
2. The research focuses on legal analysis and does not examine the technical aspects of digital distribution platforms or digital rights management in detail.
3. While the study refers to international developments for comparison, the primary focus remains on the Indian legal framework.
4. Due to limited judicial decisions in India on the application of the first sale doctrine to digital works, the study may rely on foreign case law to illustrate legal challenges.

5. The study does not cover issues related to copyright infringement in user-generated content or social media platforms, as it is limited to the principle of copyright exhaustion and online distribution of commercial digital works

Scope of the Study

This study focuses on the application of the first sale doctrine and the principle of copyright exhaustion in the digital environment. It examines how digital distribution of works such as e-books, software, music, and streaming content affects traditional copyright principles. The research is limited to the legal aspects of copyright law, analysing statutes, case law, and scholarly writings, with a primary focus on the Indian legal framework.

The study also explores comparative perspectives from other jurisdictions to highlight how digital copyright exhaustion is addressed globally. While technological and commercial aspects of digital distribution are acknowledged, the research does not delve into technical implementation details such as digital rights management or platform-specific policies. The scope is thus confined to understanding legal challenges, gaps, and potential reforms in applying the first sale doctrine to online distribution of digital works

Suggested Chapterisation

Chapter:1 Introduction

This chapter provides an overview of the research topic, explaining the concept of the first sale doctrine and the principle of copyright exhaustion. It discusses the relevance of the doctrine in the digital environment, highlights the challenges posed by online distribution, and sets out the objectives, research questions, and methodology of the study.

The advent of the digital age has significantly disrupted the traditional understanding and application of the first sale doctrine. The proliferation of digital technologies and the expansion of online distribution platforms have transformed the manner in which copyrighted works are created, disseminated, and consumed. Digital goods—such as e-books, software programs, digital music files, and streaming content—are no longer transferred in the form of physical copies but are instead accessed through downloads, cloud-based services, or streaming mechanisms. This fundamental shift from ownership of a physical object to access under a

contractual framework raises critical questions regarding the continued relevance and applicability of copyright exhaustion.

A key challenge arises from the legal characterization of digital transactions. Unlike traditional sales, many digital transactions are structured as licensing agreements, wherein users are granted limited rights to use the content rather than full ownership of a copy. These licensing models often include restrictive terms that prohibit resale, transfer, or sharing, thereby effectively circumventing the operation of the first sale doctrine. This creates a conceptual and legal tension: while consumers may perceive themselves as “owners” of digital content, the law often treats them as mere licensees. Consequently, the doctrine’s applicability in the digital environment becomes uncertain and contested.

Chapter: 2 Conceptual and Legal Framework of the First Sale Doctrine

This chapter examines the origins, development, and scope of the first sale doctrine under copyright law. It discusses the traditional application to physical works and the theoretical underpinnings of copyright exhaustion. Relevant national and international legal provisions are also explored. The first sale doctrine also known as the doctrine of exhaustion is the one of the most significant limitations on the exclusive distribution right in copyright law and it limits the copyright owner’s exclusive rights to control over copies of their works. After some time the doctrine developed as copyright law moved from a straight monopoly system to a balanced system. The balance considers not only the right of the copyright owner but also the free movement of goods in the market and also the public access to the work. The doctrine of exhaustion was stated in late 19th and 20th centuries especially in the Germany and United States copyright law¹. The legal thinker began to understand that copyright owners should not have to have control over the physical copies of their work. Copyrights give the owner exclusive rights including the rights to dispute over their copies but after some time courts and law makers realised that once the copy of their work was sold there was no control over specific copy. From this the idea of copyright exhaustion was formed². It means that if the first copy was sold the rights over the particular copy is exhausted.³

¹ Paul Goldstein, *International Copyright: Principles, Law, and Practice* 243 (Oxford Univ. Press 2019).

² World Intellectual Property Organization (WIPO), *Guide on the Exhaustion of Intellectual Property Rights* (2018).

³ MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.12[B][1] (2023).

Chapter: 3 Digital Distribution and Challenges to Copyright Exhaustion

This chapter focuses on the impact of digital technology and online platforms on the application of the first sale doctrine. It analyses issues such as licensing models, digital copying, streaming services, and technological protection measures that complicate copyright exhaustion. The relationship between distribution and copying in the conventional copyright system was clear-cut since copying entailed production and distribution of copies in physical form.⁴ Physical copies of books, CDs, and any other form of copyrighted material were manufactured, sold, and circulated as physical objects⁵. The exhaustion rule worked effectively in such a setting since the copying act was the transfer of an object.⁶ As indicated in the uploaded UNESCO report, digital reproduction entails the transfer of works via digital network.⁷ Therefore, unlike the conventional mode, there is no need for production and physical transfer of copies.⁸ Instantaneous availability and transfer of the works is the core of the digital reproduction process.⁹ Unlike physical copies, digital copies do not require manufacturing, storage, or even physical transfer. This makes the whole process faster and convenient. However, the digital reproduction process has brought about several challenges concerning copyright protection laws.

Chapter: 4 Legal Position of Copyright Exhaustion in India

This chapter examines the current Indian legal framework regarding copyright exhaustion and the first sale doctrine. It reviews statutes, judicial decisions, and scholarly opinions, highlighting the gaps and uncertainties in the law when applied to digital works. Statutory definition of exhaustion of copyright in India is found in the provisions contained in the Copyright Act, 1957.¹⁰ Contrary to jurisdictions which have expressly defined and enshrined exhaustion of copyright as a doctrine, in India, the concept of exhaustion is indirectly addressed under the Copyright Act. The statutory provisions on bundle of rights enjoyed by copyright owners form the backbone of exhaustion of copyright.¹¹ Works protected under the Copyright Act, 1957 in India include literary, musical and artistic works, cinematograph films, sound

⁴ Id.

⁵ Id.

⁶ Id.

⁷ UNESCO, Copyright and Digital Technologies 22 (2019).

⁸ Id.

⁹ Id.

¹⁰ Copyright Act, 1957 (India).

¹¹ Shamnad Basheer, Parallel Imports and Indian Copyright Law, 3 J. Intell. Prop. L. & Prac. 100, 102 (2008).

recordings, and computer programs.¹² Works are not only tangible but also intangible and therefore, a distinction can be made between the intangible work and its tangible copy, as far as copyright exhaustion is concerned. Exhaustion of copyright is essentially a restriction on copyright. Exhaustion restricts the bundle of rights of copyright owners in relation to particular copies sold to the public. As opposed to the copyright, which subsists for many years; in case of the intangible work, i.e., copyright, the rights of the owner expire once a particular copy is sold

Chapter :5 Comparative Analysis of Digital Exhaustion

This chapter compares the approaches of other jurisdictions, such as the United States, European Union, and other relevant countries, to copyright exhaustion in the digital environment. It identifies lessons that could inform Indian law and policy reforms. Legal comparison can play an important role when it comes to analyzing the development of copyright doctrines. When it comes to comparing copyright doctrines of exhaustion and first sale doctrine, it is especially important due to the fact that the interpretation of exhaustion may differ significantly from one country to another. Based on the uploaded material, copyright legislation despite being international is territorial in nature which means that each jurisdiction retains the right to determine the terms under which exhaustion applies. Exhaustion as a doctrine is intended to provide a balance between the interests of copyright holders and users.¹³ It can vary from one country to another, however, because of differences in economic policy considerations, technological development etc. Legal comparison can help us better understand the issues related to the development of exhaustion and find out what best practices can be adopted. When it comes to the issue of digital exhaustion in India, which still remains unclear, the comparative method will be extremely helpful for developing a solution that would help us adopt our legal framework to this specific area.

Chapter 6: Findings, Analysis, and Recommendations

The final chapter presents a critical analysis of the findings, evaluates the challenges in applying the first sale doctrine to digital works, and suggests legal and policy reforms to better balance the rights of copyright owners and users in the digital age. For a long time, the principle

¹² Copyright Act, 1957, 13 (India).

¹³ Daniel J. Gervais, The Internationalization of Intellectual Property, 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 935 (2002).

of exhaustion was used for this purpose, but in the era of digitalization, it proves to be less and less efficient. When assessing the prospects of further development of the principle of exhaustion in a digital context, it needs to be understood how well it can be adjusted to the modern world. There is an opinion that the only way forward is to create a special version of exhaustion specific for digital products. Other scholars believe that there should be an alternative system based on licensing. On balance, the most important lesson learned from this examination is that the classical theory of first-sale is not relevant to the contemporary technological era. The focus on issues like possession, distribution, and transfer of just one copy reduces the possibility of application to contemporary digital technology and products. Consequently, the classic theory of first sale holds significant importance in relation to physical work but is irrelevant for digital work. Finally, there is a necessity to make reforms in order to address the challenges of digital exhaustion. Nevertheless, prior to implementing any alterations in the legal framework of current law, the primary distinctions between physical and digital items must be recognized and acknowledged.

CHAPTER - 2

Chapter 2: Conceptual and Legal Framework of the First Sale Doctrine

2.1 Historical Evolution of the First Sale Doctrine

The first sale doctrine also known as the doctrine of exhaustion is the one of the most significant limitations on the exclusive distribution right in copyright law and it limits the copyright owners exclusive rights to control over copies of their works. After some time the doctrine developed as copyright law moved from a straight monopoly system to a balanced system. The balance considers not only the right of the copyright owner but also the free movement of goods in the market and also the public access to the work. The doctrine of exhaustion was stated in late 19th and 20th centuries especially in the Germany and United States copyright law¹⁴. The legal thinker began to understand that copyright owners should not have to have control over the physical copies of their work. Copyrights give the owner exclusive rights including the rights to dispute over their copies but after some time courts and law makers realised that once the copy of their work was sold there was no control over the specific copy. From this the idea of copyright exhaustion was formed¹⁵. It means that if the first copy was sold the rights over the particular copy is exhausted.¹⁶

2.1.1 Development in United States Law

The First Sale Doctrine is also known as the doctrine of exhaustion that represents one of the most significant limitations on the exclusive distribution right in copyright law its historical evolution reflects the gradual development of copyright from a rigid proprietary monopoly to a balanced legal framework accommodating market integration, property rights and public access the uploaded documents collectively trace the doctrine's origins in domestic jurisprudence its expansion within European Community law and its later recognition in international instruments.

¹⁴ Paul Goldstein, *International Copyright: Principles, Law, and Practice* 243 (Oxford Univ. Press 2019).

¹⁵ World Intellectual Property Organization (WIPO), *Guide on the Exhaustion of Intellectual Property Rights* (2018).

¹⁶ 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.12[B][1] (2023).

2.1.2 Early Conceptual Origins: Exhaustion as a Limitation on Monopoly

There is an important case in the United States supreme court related to the first sale doctrine named *Bobbs-Merrill Co. v. Straus* 1908,¹⁷ was the major turning point in American copyright law.

2.1.3 Facts and Context of Bobbs-Merrill

In *Bobbs-Merrill* the publisher inserted a notice in a book stating that it could not be resold below a fixed retail price the retailers nonetheless sold the book below that price the central legal question was whether the copyright holder could enforce downstream resale restrictions merely by inserting a notice in the book. The Supreme Court held that once the book had been lawfully sold the copyright owner could not control its subsequent resale so the Court emphasized that the copyright statute granted the right to multiply and sell copies but did not authorize perpetual control over subsequent retail transactions.¹⁸

Two important doctrines are:

1. Absence of Privity of Contract – An obligation against resale of a book printed in a book cannot bind the new buyers unless there is privity of contract.
2. Limitation of Right to Distribution – Once the copyright holder sells his property his right to distribute expires.

This decision laid the doctrinal foundation for the First Sale Doctrine in U.S. law. The reasoning was later codified in copyright legislation, affirming that lawful purchasers may dispose of their copies without infringing copyright.

2.1.4 Further Development of the First Sale Doctrine in the United States

After the decision in *Bobbs-Merrill Co. v. Straus*, the First Sale Doctrine became an important part of U.S. copyright law. Courts and lawmakers accepted the idea that once a copyrighted work is sold legally, the copyright owner loses control over that particular copy. This principle was later included in copyright legislation.¹⁹ The law clearly states that if a person owns a lawful copy of a work, they are allowed to sell, transfer, or give away that copy without needing permission from the copyright owner. This implies that there is a distinction in the law

¹⁷ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

¹⁸ *Id.*

¹⁹ 17 U.S.C. 109(a) (2023)

regarding the ownership of the actual piece and the copyright to that piece. And another very important factor to note here is that there is a distinction between ownership and copyright. The person buying a book or a CD or any tangible item simply owns the item, but he does not own the copyright to the item in question. He, however, has total discretion as to how to use his tangible property. The doctrine also helped in the growth of secondary markets because buyers can resell their copies and markets like second-hand bookstores and used CD shops and other resale platforms became possible. This increased access to copyrighted works are especially for people who may not be able to afford new copies. At the same time the doctrine does not allow unlimited use of the work and the buyer cannot reproduce, copy, or distribute new copies of the work without permission. The exhaustion theory is applicable to the particular item bought legally in order to protect the interests of the copyright holder while ensuring there is some leeway for the buyer. The creation of the First Sale Doctrine in America was a well balanced process where the right of copyright holders were taken into consideration while at the same time protecting the interest of the consumer

2.1.5 European Origins and Community Law Development

While the United States developed the doctrine through domestic case law Europe approach to exhaustion evolved primarily through judicial interpretation within the framework of the European Economic Community (EEC).and the UNESCO document explains that the exhaustion concept, originally influenced by German law, became central to preventing illegitimate exercises of copyright that interfered with free trade. In the European context, exhaustion was closely tied to the principle of free movement of goods within the common market²⁰.

A foundational European case is **Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte+ GmbH (1971)**. In this case sound recordings marketed in one Member State were imported and resold in another so the copyright holder sought to prevent the parallel importation. The European Court of Justice held that once goods protected by copyright are lawfully marketed in a Member State with the consent of the right holder the distribution right is exhausted throughout the Community,²¹ allowing the right holder to prevent further distribution would legitimize market partitioning which was incompatible with the objectives of the common market. This ruling introduced the doctrine of Community exhaustion, where

²⁰ Case 78/70, *Deutsche Grammophon GmbH v. Metro-SB-Großmärkte GmbH*, 1971 E.C.R. 487.

²¹ *Id.*

the first sale or marketing of the product inside the Community exhausted the right of distribution everywhere within the Community Member States. European exhaustion did not stop with Deutsche Grammophon. There were subsequent rulings that further defined the parameters of exhaustion.

2.1.6 Musik-Vertrieb Membran GmbH v. GEMA (1981)²²

This case dealt with an instance wherein the sound recording was sold via statutory licensing in one Member State and then imported to another Member State. In this case, the Court held that there cannot be any imposition of additional levies by the copyright management society when a lawful marketing of the product had already taken place. Once again, the Court stated that upon completion of the particular use that is within the copyright—namely the first sale—no restriction can be imposed on distribution.

Cinematographic works could be shown repeatedly through performance or broadcasting and therefore the specific subject matter of copyright was not exhausted by a single distribution of a physical copy. This distinction became crucial in later digital debates. Exhaustion was linked to the circulation of physical goods, not to repeated service-based exploitation.

Expansion Through EU Directives. As European integration progressed the doctrine of exhaustion was incorporated into legislative harmonization measures. The Software Directive introduced exhaustion in relation to computer programs stating that the first sale in the Community exhausts the distribution right for that copy. However rental rights were expressly excluded from exhaustion. Similarly, the Rental Directive and the Database Directive reaffirmed the principle of Community wide exhaustion while maintaining exclusions for rental and online transmission. Later on, the InfoSec Directive standardized the general right of distribution and clarified that exhaustion can apply to tangible items only. Recitals indicated that online activities do not exhaust any right. European law introduced exhaustion as a regional principle applicable to tangible copies only.²³

²² Case 55/80, Musik-Vertrieb Membran GmbH v. GEMA, 1981 E.C.R. 147.

²³ Case 62/79, Coditel SA v. Ciné-Vog Films SA, 1980 E.C.R. 881

2.1.7 International Recognition: TRIPS and WIPO Treaties

At the international level exhaustion was not originally addressed in the Berne Convention. However later agreements acknowledged its importance. Article 6 of the TRIPS Agreement explicitly leaves the issue of exhaustion to member states.²⁴ The UNESCO document confirms that TRIPS does not adopt a uniform exhaustion regime so that WIPO Copyright Treaty {WCT} and the WIPO Performances and Phonograms Treaty {WPPT} further recognized exhaustion but granted states discretion in determining its scope and they Agreed Statement clarified that exhaustion applies only to tangible copies. International instruments did not mandate a particular exhaustion model but acknowledged its relevance in distribution rights. Transition Toward the Digital Era.²⁵

However, the concept was developed primarily for tangible goods, which implies that its applicability is limited only to items that one can perceive through touch. The UNESCO paper mentions that digital technologies have the capacity for perfect and limitless reproductions at a minimal expense. It meant that the previous understanding regarding the sale of a single copy had been challenged due to the new developments in technology. The exhaustion and digital copies paper mentions controversies that arose following the cases UsedSoft and ReDigi, where the courts were unsure of how to apply exhaustion doctrine in relation to digital copies.²⁶

2.2 Theoretical Justifications of Copyright Exhaustion

The exhaustion doctrine, also referred to as the First Sale Doctrine, has several crucial theoretical justifications. It helps to justify why copyright law imposes restrictions on the powers of the copyright holder after the initial sale of the copy. According to the documents uploaded in the file, the exhaustion doctrine is more than just a legal rule; it is also based on equity and efficiency considerations. As stated above, the law bestows upon creators a great number of rights and these rights have to be restricted in some way for the law to work well.

²⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, 1869 U.N.T.S. 299.

²⁵ WIPO Copyright Treaty art. 6, Dec. 20, 1996, 2186 U.N.T.S. 121

²⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, UNDERSTANDING COPYRIGHT AND RELATED RIGHTS 45 (2020).

2.2.1 Limitation of the Distribution Right

One of the main justifications of copyright exhaustion is that it limits the exclusive right of distribution. Copyright law gives the owner the right to distribute copies of a work to the public but this right cannot continue forever for each copy that has already been sold. Once a copy is sold legally with the permission of the copyright owner the control over that particular copy comes to an end. This means that the copyright owner cannot control future sales, lending, or transfer of that copy. This limitation is very important because without it copyright owners would have unlimited power over all copies even after selling them. They could control resale prices and restrict who can buy the work or even stop the resale completely. This would create a very strong monopoly and would affect the freedom of trade. The uploaded materials explain that such unlimited control would be harmful to both consumers and the market. Exhaustion ensures that copyright protection is reasonable and does not go beyond its intended purpose.

2.2.2 Prevention of Double Remuneration

A further reason for which copyright exceptions exist is to prevent double compensation. This is explained quite explicitly by UNESCO in their document, where it is stated that it would be unjust if the copyright holder is allowed to get paid every time the same copy is resold after getting paid for it the very first time it was sold. The point here is to ensure that the copyright holder gets paid once for his work. For example, when a person buys a book the author and publisher already earn money from that transaction. If the buyer later sells the book to another person the copyright owner should not claim additional payment because it is still the same copy. Allowing repeated payments would create an unfair advantage for copyright owners and increase costs for consumers. It is also important in ensuring fairness in the market place. This is because exhaustion of rights guarantees that the consumer will not have extra expenses incurred when he wishes to sell his property.

2.2.3 Protection of Property Rights of Buyers

The protection of property rights of buyers is another strong justification for the doctrine.²⁷ The Indian article explains that once a person buys a physical object such as a book, CD, or DVD, they become the owner of that object. As the owner, they have full control over it including the right to use, sell, lend, or gift it. This is a basic principle of property law. It is also important in

²⁷ Lionel Bently & Brad Sherman, *Intellectual Property Law* 210 (5th ed. 2018).

ensuring fairness in the market place. This is because exhaustion of rights guarantees that the consumer will not have extra expenses incurred when he wishes to sell his property. Such control would reduce the value of ownership because buyers would not have full freedom over what they own. It would also create confusion and uncertainty in transactions. Exhaustion protects the rights of buyers and ensures that ownership of physical goods is meaningful and effective.

2.2.4 Promotion of Secondary Markets

There is a justification of exhaustion is that it promotes the development of secondary markets. However, exhaustion ensures that the consumers can resell their copies of the copyrighted work freely and enables the emergence of second-hand markets like the resale of books in libraries. These second-hand markets serve as essential aspects of society since they enable people to acquire these works at cheaper prices. For example, if students and low-income individuals can purchase second hand books instead of expensive new ones. This improves education and information sharing. Additionally, secondary markets contribute to efficient resource utilization since rather than discarding such things that have been utilized before, people can trade them to those who still find them useful. It ensures sustainability and conservation of the consumed. Without exhaustion, this market cannot be operational since each sale made requires approval from the copyright holder.²⁸

2.2.5 Balance of Authors' and Public Interests

Exhaustion is important for balancing the interests of the author and the general public. As mentioned in the UNESCO publication, "copyright law seeks a balance between the interests of the author and of the general public and of the work itself." Authors should receive fair compensation for their creations but the public should also have access to those works. Before the first sale the copyright owner has full control over distribution. This ensures that they can earn revenue and recover their investment. After the first sale the control shifts to the buyer allowing the work to circulate freely in society. This balance is very important because it encourages creativity while also promoting access. If copyright protection is too strong it may limit access to knowledge and culture. If it is too weak it may reduce incentives for authors to create new works. Exhaustion ensures that both interests are protected in a fair manner.²⁹

²⁸ Julie E. Cohen et al., *Copyright in a Global Information Economy* 412 (4th ed. 2015).

²⁹ PETER MEZEI, *DIGITAL FIRST SALE DOCTRINE IN THE EU* 25–30 (2015).

2.2.6 Free Movement of Goods and Market Integration

The other basis for exhaustion in the case of Europe lies in the concept of the free movement of goods. According to the UNESCO document, exhaustion helps protect the rights of consumers from the attempts by copyright owners to limit the free movement of goods across national borders.³⁰ This is because exhaustion helps create a single market environment within which products can freely be moved.³¹ Without exhaustion, copyright owners could effectively split the market by selling their products in different countries and banning the sale of the same products in other territories.³² Such practices will not help in fostering free competition. In the European legal framework, exhaustion facilitates the free movement of goods and, therefore, creates a market.³³

2.2.7 Encouragement of User Freedom and Innovation

Another justification is that exhaustion encourages user freedom and innovation. When people have the freedom to use and transfer copies they own, they can find new and creative ways to use them.³⁴ The uploaded materials mention that exhaustion supports user innovation and allows individuals to interact with works more freely. In fact, libraries can lend out their books to more than one person, and hence make information available to many people. In addition, works can be reproduced or modified in an appropriate manner within the scope of the law, thus facilitating innovations. In case copyright holders had exclusive rights over all the uses of their works, it would definitely curb creativity in the society. Thus, exhaustion facilitates the process of fostering creativity in society.

2.2.8 Reduction of Transaction Costs and Legal Complexity

Finally, exhaustion reduces transaction costs and legal complexity. As stated by UNESCO, where physical products are concerned, the process is straightforward and unambiguous.³⁵ Upon selling the product, the buyer can use it or sell it again without seeking any additional permissions.³⁶ This enhances efficiency in the market since the seller and buyer will be spared

³⁰ UNESCO, Copyright and the First Sale Doctrine 12–14 (2017).

³¹ *Id.*

³² *Id.*

³³ Council Directive 2001/29/EC, art. 4(2), 2001 O.J. (L 167) 10 (EC).

³⁴ PETER MEZEI, *supra* note 1, at 40–45.

³⁵ UNESCO, *supra* note 2, at 18–20.

³⁶ *Id.*

from having to manage legal requirements for each transaction.³⁷ On the contrary, in non-exhaustion models, each sale would require permission, making the process cumbersome and costly.³⁸ Analysis of the basis of the concept of exhaustion of copyrights explains why exhaustion of copyrights is an important part of the copyright scheme. The exhaustion doctrine limits the rights of copyright owners to a reasonable extent but at the same time protects the rights of buyers and ordinary people. In addition, the doctrine ensures no double payment, protects property rights, promotes secondary trading market and maintains proper balance between authors and ordinary people.³⁹ Furthermore, the doctrine acts as a trigger in promoting economic development through free flow of goods.⁴⁰

2.3 Theoretical Justifications of Copyright Exhaustion

The principle of exhaustion, commonly referred to as the First Sale Doctrine, can be justified through many significant theories. The theory provides an explanation of why the control of the copyright owner should be regulated after the first sale of the copy. It will be noted from the uploaded documents that apart from being a legal principle, the principle of exhaustion is based on principles of justice, economics, and balancing of interests in the society. While the copyright law confers many powers to the creator, there should be a limit to such powers for effective operation of the legal framework.

2.3.1 Limitation of the Distribution Right

One of the main justifications of copyright exhaustion is that it limits the exclusive right of distribution. Copyright law gives the owner the right to distribute copies of a work to the public but this right cannot continue forever for each copy that has already been sold. Once a copy is sold legally with the permission of the copyright owner the control over that particular copy comes to an end. This means that the copyright owner cannot control future sales, lending, or transfer of that copy. This limitation is very important because without it copyright owners would have unlimited power over all copies even after selling them. They could control resale prices and restrict who can buy the work or even stop the resale completely. This would create a very strong monopoly and would affect the freedom of trade. The uploaded materials explain

³⁷ Id.

³⁸ Id.

³⁹ WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:15 (2020).

⁴⁰ Id.

that such unlimited control would be harmful to both consumers and the market. Therefore exhaustion ensures that copyright protection is reasonable and does not go beyond its intended purpose.

2.3.2 Prevention of Double Remuneration

A further reason that can be highlighted is the avoidance of dual remuneration. As stated in the UNESCO publication, once the copyright holder receives compensation after selling the first copy, it would be wrong for him to continue receiving payments whenever that particular copy is sold again.⁴¹ The purpose of copyright is to compensate the author for his creation and not for the sale of the same material object.⁴² For example when a person buys a book the author and publisher already earn money from that transaction. If the buyer later sells the book to another person the copyright owner should not claim additional payment because it is still the same copy.⁴³ Allowing repeated payments would create an unfair advantage for copyright owners and increase costs for consumers.⁴⁴ This principle also helps in maintaining fairness in the market.⁴⁵ It ensures that buyers are not burdened with additional costs when they resell their property.⁴⁶ Exhaustion prevents unjust enrichment and promotes fairness in economic transactions.⁴⁷

2.3.3 Protection of Property Rights of Buyers

Furthermore, the protection of the property rights of consumers is another significant reason for supporting exhaustion doctrine. According to the Indian article, once an individual purchases the tangible product, say, a book, CD, or DVD, he or she becomes the owner of the item purchased.⁴⁸ In other words, the ownership implies having complete control over that item, which includes using, selling, lending, or giving away the tangible object to others. Thus, ownership of a tangible object involves all these actions.⁴⁹ On the other hand, it must be stated that the uploaded sources indicate that there is no copyright involved with the purchase of a tangible object.⁵⁰ While buying tangible objects, individuals do not receive any copyright on

⁴¹ UNESCO, Copyright and the First Sale Doctrine 10–12 (2017)

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ N.S. GOPALAKRISHNAN, INTELLECTUAL PROPERTY LAW IN INDIA 210–12 (2016).

⁴⁹ Id.

⁵⁰ Id.

the object bought. However, this means that it would not be reasonable to allow copyright owners to control the item even after the sale of a tangible object. Such a situation would lead to the loss of the essence of owning anything since the owner would have limited rights.

2.3.4 Promotion of Secondary Markets

Furthermore, the protection of the property rights of consumers is another significant reason for supporting exhaustion doctrine. According to the Indian article, once an individual purchases the tangible product, say, a book, CD, or DVD, he or she becomes the owner of the item purchased. In other words, the ownership implies having complete control over that item, which includes using, selling, lending, or giving away the tangible object to others. Thus, ownership of a tangible object involves all these actions. On the other hand, it must be stated that the uploaded sources indicate that there is no copyright involved with the purchase of a tangible object. While buying tangible objects, individuals do not receive any copyright on the object bought. However, this means that it would not be reasonable to allow copyright owners to control the item even after the sale of a tangible object. Such a situation would lead to the loss of the essence of owning anything since the owner would have limited rights.

2.3.5 Balance Between Authors and Public Interest

The doctrine of exhaustion helps maintain a balance between the rights of authors and the interests of the public. According to the UNESCO document, copyright law is designed to balance the interests of the author and the public and the work itself. Authors should receive fair compensation for their creations but the public should also have access to those works. Before the first sale the copyright owner has full control over distribution. This ensures that they can earn revenue and recover their investment. After the first sale the control shifts to the buyer allowing the work to circulate freely in society. This balance is very important because it encourages creativity while also promoting access. If copyright protection is too strong, it may limit access to knowledge and culture. If it is too weak it may reduce incentives for authors to create new works. Exhaustion ensures that both interests are protected in a fair manner.

2.3.6 Free Movement of Goods and Market Integration

The principle of exhaustion in the European legal framework is also justified based on the principle of the free movement of goods. The explanation provided in the UNESCO document states that exhaustion ensures that the copyright owner cannot impose restrictions on the

circulation of goods from one state to another.⁵¹ If there is no exhaustion, then the copyright owners may engage in market segmentation practices. For example, they may sell their goods in one state but prevent resale in another. In addition, this practice would cause competition issues. Thus, the European legal framework realizes that such actions by copyright holders are contrary to economic integration. Hence exhaustion helps achieve the goal of the free movement of goods and assists in developing the unified market.

2.3.7 Encouragement of User Freedom and Innovation

The next point here is the fact that exhaustion fosters innovations and gives freedom to the users. With freedom to use and transfer copies owned by a person, one can discover new ways to exploit those copies. As indicated in the uploaded materials, exhaustion facilitates innovations and increases interactions with the works. For instance, libraries can lend out books that can be used by several persons. It means that people can do anything with the materials, as long as they operate within legal regulations. Exhaustion provides an opportunity for the advancement of culture and technology.⁵² If there was full control on all possible uses of the copies, it could hinder innovations and development.

2.3.8 Reduction of Transaction Costs and Legal Complexity

Lastly, exhaustion decreases transaction costs and legal intricacies. According to the UNESCO report, when physical products are concerned transactions are easy and straightforward. After selling a copy the buyer will be able to use it as he pleases. The advantage of this is that there is no need for any further permission, thereby reducing the burden on buyers and sellers of having to engage in complex and detailed legalities during transactions. Another benefit is that it cuts down transaction costs.⁵³ On the other hand, exhaustion lessens the need for permission for resale.

To conclude, the justifications provided theoretically to support copyright exhaustion demonstrate how it is indeed a critical aspect of copyright law. This doctrine serves to check the extent of powers of the copyright holder in an appropriate manner to ensure that consumers' interests as well as those of the general public are safeguarded. Moreover, it acts as an impediment to double charging, respects property rights, and allows for efficient secondary

⁵¹ Id.

⁵² Id.

⁵³ UNESCO, *supra* note 1, at 18–20.

markets. It also contributes immensely towards economic growth and development by facilitating the movement of goods, fostering innovations, and simplifying the law.⁵⁴

2.4 Traditional Application to Physical Copies

It is also referred to as the exhaustion doctrine. This principle has always been applied to copies of copyrighted work in tangible form. From the uploaded materials, one can see that the principle arose in a time when copyright works were distributed physically through mediums like books, music disks, DVDs, and all tangible media. The application of the exhaustion principle has, therefore, been strongly tied to the concept of transferring tangible property ownership. This part will discuss how the principle is applied to physical copies and the underlying laws.

2.4.1 Application to Tangible Copies

In its traditional interpretation, the First Sale Doctrine is restricted to copies of the work which can be considered tangible. The materials uploaded highlight the significance of the fact that the exhaustion principle can only apply if there was a transfer of a physical object from the copyright holder to an individual buying it. In terms of the WIPO guidelines described in the documents, the exhaustion principle only concerns tangible copies of the work that may be disseminated as physical objects. In other words, the concept is directly tied to the existence of an actual physical object. For instance, once the printing process is completed and the book is sold, it becomes a tangible object that may be owned by someone and subsequently transferred. In case the initial transfer is made with the copyright owner's consent, the exhaustion principle comes into play as the distribution right related to the concrete copy ceases to exist. The critical feature of physical objects is that they have a limited number of copies and may be owned exclusively by a single individual.

2.4.2 Transfer of Ownership and Control Over Copies

One of the essential aspects of exhaustion is the transfer of ownership⁵⁵ of a copy. According to the Indian article, whenever a copy of a creative work is sold, the ownership of that copy will completely pass to the buyer. At that point, the copyright holder will have no further

⁵⁴ PETER MEZEI, *supra* note 15, at 50–55.

⁵⁵ Indian Copyright Act, No. 14 of 1957, 14.

control over that copy. In essence, the transfer of ownership is based on property laws, which provide that when there is a transfer of ownership, then it cannot be put to any other restriction in terms of usage or transfer by the previous owner. Applying this rule in copyright law, it will mean that whoever buys a book or a CD has the right to do what he wants with that copy. It is noteworthy that it is only the ownership of the copy that is transferred and not copyright in the work. The copyright of the work remains with the creator or copyright owner⁵⁶. The buyer will not have the ability to reproduce the work. However, he will have all other privileges including selling, lending, gifting and using the copy of the work.⁵⁷

2.4.3 Resale and Secondary Distribution of Physical Copies

According to the doctrine of exhaustion, a lawful resale and redistribution of physical copies do not need the copyright holder's consent. If a copy was sold legally, then the buyer can resell the copy to another individual. This process may occur several times without requiring authorization from the copyright holder. As seen from the uploaded files, this doctrine is crucial for the effective operation of secondary markets. Such markets involve second-hand bookstores and other platforms. The absence of exhaustion makes secondary markets impossible since all resales will need the copyright owner's approval. The resale of goods provides wider availability of copyrighted works. Individuals that cannot purchase new copies of works can acquire them in secondary markets for less money. It is important for spreading culture and knowledge. On the other hand, exhaustion guarantees that the copyright owner has been paid once the item was sold. Hence, the resale of items will not affect the financial situation of the copyright holder.

2.4.4 Lending and Library Use of Physical Copies

In relation to the traditional use of exhaustion, it is pertinent to mention another factor, which refers to the loaning and library systems. According to the uploaded documents, if we consider the situation in the physical world, libraries have the ability to rent books, i.e. to allow several people to borrow one book in turn. This is because the library has the legal right to own this physical item, but to lend it to different people, while keeping the ownership rights for itself. As for the traditional doctrine of exhaustion, it helps to justify the described approach to borrowing because of the opportunity to transfer a legally owned copy to other people. This

⁵⁶ Id

⁵⁷ Id

practice has many positive aspects because it facilitates access to education and knowledge; however, according to the presented materials, there might be some limitations, including those related to renting the property.

2.4.5 Distinction Between Distribution and Other Rights

Application of exhaustion to the right of distribution alone and not any other rights like reproduction or public performance is also one of the principles that have been traditionally applied.⁵⁸ The explanation of this principle by UNESCO in its publication on the matter suggests that exhaustion only applies to physical products and not to services or acts which may be undertaken more than once. Public performance of audiovisual works and musical pieces, for instance, is not a subject of exhaustion because it is an act of reusing the work rather than transferring one particular copy of the work to another person. In the same vein, broadcasting and communication to the public are also not governed by the doctrine of exhaustion.⁵⁹ This principle was further explained in various cases at the European Court of Justice including the case of Coditel I.⁶⁰

2.4.6 Rental and Commercial Exploitation

Similarly, the classical doctrine of exhaustion does not cover particular uses of the copyright material commercially, including rental.⁶¹ According to the uploaded documents, in most cases, rental is treated differently from distribution. This implies that although the copyright material may have been sold once, the copyright holder may retain the right to regulate any further rental of the copyrighted product. For instance, the owner of a DVD or software product may be obliged to grant permission for the copyrighted material to be rented out, despite having made a sale once. This is due to the fact that renting out copyrighted material may create a different impact on the market than resale of such material. Consequently, this demonstrates that the doctrine of exhaustion does not apply to all instances of commercial use. In particular, exhaustion only applies to resale of the copyrighted material, and not all types of commercial exploitation.

⁵⁸ UNESCO, *Copyright and the First Sale Doctrine* 12–15 (2017).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

2.4.7 Territorial Nature of Exhaustion in Physical Copies

The use of exhaustion on physical copies is also affected by territoriality.⁶² According to the uploaded documents, copyright laws are territorial because the application varies from one country to the next. Countries that practice national exhaustion will have their distribution rights exhausted only in their jurisdictions. On the other hand, countries that observe regional exhaustion like the European Union will apply exhaustion in all the participating nations. There is also a scenario where international exhaustion happens whereby exhaustion is done after selling once anywhere around the globe. Exhaustion practices play an important role when importing physical copies across jurisdictions. Parallel imports may be possible depending on the type of exhaustion followed by a country.⁶³

Traditional use of exhaustion is tightly associated with the distribution of tangible copies of the copyrighted work. This concept implies the transfer of ownership of the tangible copy, as well as the restriction of further copyright owner's control following the first sale. The principle of exhaustion provides opportunities for resale, lending and redistribution of copies, while recognizing the difference between the ownership of a tangible copy and the right to copyright. However, the traditional use of the exhaustion principle has some restrictions. For example, it cannot be applied to reproduction, public display or certain business uses like renting. In addition, it can be influenced by territorial aspects, which differ from one jurisdiction to another. In general, the traditional exhaustion has greatly contributed to promoting access, facilitating markets and balancing copyright holders' rights with public interest concerns.

2.5 Traditional Application to Physical Copies

The First Sale Doctrine, also called exhaustion, has been historically applied to tangible copies of copyrighted works⁶⁴. As seen from the uploaded papers, exhaustion was born and has been developing in an era where copyrighted works were mostly disseminated using tangible items such as books, records, CDs, DVDs, among others.⁶⁵ The origins of exhaustion are strongly linked to property transfer, as the concept is grounded in the notion of transferring ownership

⁶² PETER MEZEI, DIGITAL FIRST SALE DOCTRINE IN THE EU 30–35 (2015).

⁶³ *Id.*

⁶⁴ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

⁶⁵ *Id.*

over tangible goods.⁶⁶ The traditional application of the doctrine shows a legal approach acknowledging property interests, as well as limiting exclusive rights after a sale occurs.

2.5.1 Tangible Nature of Copyrighted Copies

One key element regarding the traditional use of the exhaustion principle is its relationship to copies. In relation to this, the documents uploaded show that the exhaustion principle applies to “fixed copies,”⁶⁷ which are real objects that can be circulated. Such an understanding is also echoed in the WIPO system, where it is explained that the exhaustion principle applies to the distribution of tangible items and not to intangible dissemination.⁶⁸ The physical copy includes physical items such as books printed on paper or audio files stored on a disk.⁶⁹ Such physical copies have certain features that allow applying the exhaustion principle efficiently. Physical copies cannot be shared since they belong exclusively to one individual. Physical copies do not reproduce when transmitted to another party. The selling or purchase of a physical copy involves the exchange of the same object without creating any copies. It is important to understand that the importance of tangible nature is in that it provides a basis for separating distribution from reproduction. While in distribution the existing item is merely transferred, reproduction means creating a copy. In a conventional tangible world, reselling or loaning does not involve any reproduction and hence does not violate any rights held by the copyright holder exclusively.⁷⁰

2.5.2 Transfer of Ownership and Property Rights

The exhaustion principle has always had strong connections with the idea of ownership in property law. The uploaded Indian article describes the process in which the ownership of a copy of the copyrighted work is transferred entirely to the purchaser.⁷¹ Thus, after the transfer of ownership takes place, the copyright holder loses all rights to control the copy of the work. It is important to remember the basic principle of property law, which states that once a piece of property has been transferred, the prior owner will not be able to make any claims or set any conditions concerning the use of this property by its new owner. Nevertheless, at the same time, it should be noted that according to the documents, ownership of the copy is different from

⁶⁶ Id.

⁶⁷ WIPO, Guide on Copyright and Related Rights (2003).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ *Bobbs-Merrill*, 210 U.S. 339.

ownership of the copyright, which is retained by the author himself or the copyright owner. The buyer will get a material copy of the product, and not the copyright. In other words, the buyer can take any actions that he wants with respect to his copy, except those which violate the terms of the copyright legislation. It should be emphasized that this double system of legal relations is absolutely necessary in the copyright sphere.

2.5.3 Resale and Circulation of Physical Copies

Among other effects of the exhaustion concept, one of the most notable is the possibility for a product to be resold and circulated even more. Once the copy becomes legally transferred to someone else's possession, this individual will have the right to transfer it further to a third party without requiring an additional authorization of the copyright holder. The cycle of selling and purchasing may be endless in this way. According to the uploaded materials, it should be noted that this feature of exhaustion concept is highly relevant for secondary markets, including the used books market and resale market.⁷² These markets perform an essential function in enhancing accessibility of copyright objects. The possibility of reselling physical copies is another aspect that leads to cost-effectiveness. People who find it difficult to pay for new copies can buy used copies at cheaper rates. In an educational setting, this factor plays a significant role because students need books and other learning materials. In addition, the distribution of physical copies guarantees the availability of a work beyond its active dissemination by the copyright holder. Sold copies will still be available in the market for other users to access.

2.5.4 Lending and Library Systems

Even the conventional use of exhaustion provides support for lending activities, especially in libraries. The documents attached indicate that, in the real world, libraries are capable of lending out copies of books to many different people. This is made possible by virtue of the fact that the library owns the physical copy of the book but does not need to have ownership rights over it.⁷³ The exhaustion doctrine grants the legitimate owner of a copy to enable others to have access to it, and there are many social advantages from it. The libraries act as centers for facilitating learning through knowledge and culture. Through them, many people can borrow books without paying for them. In addition, the texts clarify that the library system is known for its contribution to improved literacy and information sharing through the use of a

⁷² WIPO, *supra* note 4.

⁷³ UNESCO, *Copyright and Access to Knowledge* (2015).

single copy by several users. The concept of exhaustion allows efficient resource use through the provision of information to more people. While there might be restrictions in some jurisdictions regarding lending of books due to the existence of public lending rights or the need for licenses, the underlying rule is that any legitimate possessor of a tangible copy can lend his copy without committing any infringement.

2.5.5 Distinction Between Distribution and Other Copyright Rights

Traditionally, the doctrine of exhaustion applies solely to the right of distribution and excludes other exclusive rights like reproduction, public performance, and communication to the public. Indeed, the UNESCO paper draws a distinction between the circulation of tangible objects and service provisions as well as multiple performances of a work. Thus, for instance, when talking about the public performance of a film or music composition, there is no talk about exhaustion. Here, the repeated use of the work takes place and the copyright holder keeps possession of it. In addition, broadcasting or other means of communication to the public cannot be regarded as an exercise of the right of exhaustion since these actions consist of placing works in a position of being accessible for a large audience, but do not include the transfer of tangible copies. Furthermore, it should be noted that the Coditel I judgment from the European Court of Justice has once again emphasized that the doctrine applies only to distribution and does not cover any performance rights.⁷⁴

2.5.6 Rental Rights and Commercial Limitations

Although the exhaustion principle permits resale and assignment of property rights, it does not necessarily extend to the activity of renting. The documents submitted show that in many jurisdictions, the right to rent copies is distinguished from the right to distribute them. Thus, even after the initial sale, the copyright owner retains the power to determine the terms of the rental of the copies.⁷⁵ Since renting constitutes a different form of exploitation of works for commercial purposes, it enables multiple people to make use of the work without owning a copy. In doing so, it directly impacts the economic success of the work since it may prevent individuals from purchasing their own copies. Therefore, special provisions, like the EU Rental Directive, exist to protect the right to rent copies and enable the copyright holder to profit from its use.

⁷⁴ Case 62/79, Coditel SA v. Ciné-Vog Films SA (Coditel I) (1980).

⁷⁵ Directive 2006/115/EC (EU Rental Directive).

2.5.7 Territorial Aspects of Exhaustion in Physical Copies

The use of exhaustion when dealing with physical copies is also affected by territorial issues. As seen from the uploaded documents, copyright law works territorially, and hence exhaustion may take place in various ways in different nations.⁷⁶ Some nations will have a system where exhaustion is national, implying that once a product is sold in one nation, its distribution right is exhausted within the territory in which it was sold. Other nations, for instance, the European Union, will have exhaustion as being regional, which means that the good can freely circulate within a particular region. There are also nations where exhaustion will be international; in this case, the distribution right is exhausted once the goods are sold anywhere in the world.

2.5.8 Practical and Economic Importance in Physical Markets

To begin with, practically speaking, exhaustion doctrine is very important for the effective operation of markets in the physical goods industry. According to the materials uploaded, exhaustion of rights allows one to effectively conduct their business by giving freedom to copy owners to use their copies in any way they wish without any limitations imposed by the law. Moreover, exhaustion increases consumers' benefits in terms of availability of the works and competition that leads to price reduction. Finally, exhaustion allows one to conserve cultural heritage since physical copies of the work would continue circulating despite the fact that the copyright holder stopped distributing their copy.⁷⁷

First, traditional exhaustion was designed for the physical distribution of copies of the copyrighted work. Such exhaustion implies the ownership of tangible things rather than limiting the power of copyright owners regarding the use of copyright.⁷⁸ This implies that one can rent, lend, resell, and even perform some other actions with a copy of a copyrighted work while distinguishing the ownership of a thing from ownership of copyrights. Still, there are limitations to the exhaustion as well. The exhaustion of the copyright owner's power is limited by such factors as reproduction, public performances, as well as other actions associated with specific uses, including renting. Besides, territoriality is another limitation, implying that different jurisdictions have different approaches to copyright exhaustion. From this point of view, exhaustion plays an important role in ensuring the balance of interests within the process of copyrighting.

⁷⁶ WIPO, *supra* note 4.

⁷⁷ *Id.*

⁷⁸ *Id.*

2.6 International Legal Framework (Berne Convention, TRIPS Agreement, and WIPO Copyright Treaty)

The principle of exhaustion, which is also referred to as the First Sale Doctrine, exists in an overall context of international copyright law. Although the principle is relatively mature when it comes to both national and regional laws, the case with international cop

2.6.1 Types of Exhaustion: National, Regional, and International

Exhaustion is a doctrine commonly referred to as First Sale Doctrine and does not apply equally in all areas.⁷⁹ This is evident from the documents that have been uploaded above and that have illustrated the differences in approach to the concept of exhaustion in various countries or regions, depending on the legal environment, economic policies, and business needs. In general terms, the models for approaching exhaustion fall into three categories,⁸⁰ namely national exhaustion, regional exhaustion, and international exhaustion. This classification of exhaustion into these three categories becomes essential owing to the territoriality of copyright laws.⁸¹ In this regard, the rights afforded by copyright laws are only applicable within the jurisdiction of the country concerned. Therefore, the issue regarding exhaustion of the distribution right following a first sale is determined based on the geographical location of the sale and the laws applied therein. The documents uploaded state that there is no uniform international regime when it comes to the issue of exhaustion.⁸²

2.6.2 National Exhaustion

The doctrine of National exhaustion refers to the system of copyright law where the distribution right of the copyright holder gets exhausted within the confines of the nation wherein the sale took place.⁸³ As per the Indian article that has been uploaded by us, in accordance with this concept, upon a lawful sale of the copy within a particular nation, the copyright holder is left with no authority over its future distribution within the concerned nation.⁸⁴ However, he retains

⁷⁹ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

⁸⁰ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 199 (4th ed. 2012).

⁸¹ Silke von Lewinski, *International Copyright Law and Policy* 158 (2008).

⁸² Daniel J. Gervais, *The Internationalization of Intellectual Property*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 935 (2002).

⁸³ Copyright Act, 1957, § 14 (India).

⁸⁴ *Id.*

the right to govern the importation of such copies within his jurisdiction. Therefore, in case a copy of a work is being sold in one nation, the same cannot be bought and sold in another nation without the approval of the copyright holder. In accordance with the Indian documents, it can be observed that India practices the system of National exhaustion, enabling the copyright holder to restrict parallel imports of goods from the foreign market.⁸⁵ National exhaustion has many connections to the territorially limited aspect of copyright laws. As it is protected on a state-by-state basis, national exhaustion can be deemed to be acceptable within the framework of such legal systems, since it only limits its scope to the area covered by the specific state. This enables the copyright holders to control the way in which their work is spread out into different markets and apply different pricing models depending on the situation prevailing in the particular market. Nevertheless, national exhaustion can serve as an obstacle to trade in many instances. By giving copyright holders the right to ban the imports of the same goods produced in other states, it creates segmented markets and weakens competition. Thus, consumers in one nation may face increased costs compared to those living in another nation for the same product. Nonetheless, this method of exhaustion continues to be widely applied, especially by nations wishing to protect their own markets.⁸⁶

2.6.3. International Exhaustion

International exhaustion is a broader model in which the copyright owner's distribution right is exhausted globally after the first authorized sale of a copy.⁸⁷ According to the uploaded documents, under this system, once a copy is sold anywhere in the world with the consent of the copyright owner, the owner loses the right to control its further distribution in any country. This means that copies of copyrighted works can be freely imported and resold across borders without requiring additional permission from the copyright owner. The uploaded Indian article notes that the United States follows a form of international exhaustion, allowing parallel importation of goods that have been lawfully sold abroad.⁸⁸ The principle of international exhaustion promotes free trade and global market integration.⁸⁹ It prevents copyright owners from dividing markets and charging different prices in different countries. Consumers benefit from this system because they can access goods from other countries at lower prices.

⁸⁵ Shamnad Basheer, Parallel Imports and Indian Copyright Law, 3 J. Intell. Prop. L. & Prac. 100, 104 (2008).

⁸⁶ Frederick M. Abbott, Parallel Importation, 19 Int'l Rev. Indus. Prop. & Copyright L. 607, 610 (1988).

⁸⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁸⁸ *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

⁸⁹ Keith E. Maskus, *Intellectual Property Rights in the Global Economy* 142 (2000).

International exhaustion will also lead to stiff competition among the sellers as they can be free to operate across boundaries. This means efficiency can be promoted within the industry as well. Nonetheless, it might make it difficult for the copyright owners to exercise control over pricing and market distribution strategies. According to the attached documents, although international exhaustion will promote the interest of the consumers and promote free trade, it can pose some problems for copyright owners seeking to manage their markets. Therefore, it is not used by all nations.

2.6.4 Regional Exhaustion

A system of regional exhaustion is somewhere in between national and international exhaustion. According to such a system, distribution rights will be exhausted in a particular region that includes more than one country. An important example of regional exhaustion is that of the European Union.⁹⁰ According to the uploaded documents, under the European system of exhaustion, when a copy of an article protected by copyright is sold in any member state of the European Economic Area (EEA), then the right to distribute the copyright is exhausted in the whole region,⁹¹ and that copy can be moved from one member state to another without any problem. However, the copyright holder will have control over the importation of such copies from other countries. The creation of the concept of regional exhaustion in the EU is associated with the concept of free movement of goods.⁹² The UNESCO document uploaded above shows that the European Court of Justice established that the imposition of any restrictions on the movement of goods within the territory of the region contradicted the idea of forming a common market. The concept of regional exhaustion contributes to economic integration by eliminating trade barriers among members of the union. Thus, it facilitates the circulation of goods within the territory of the union, which results in healthy competition and reduced prices for consumers. In addition, it grants copyright owners the right to control goods entering the territory from other countries.

2.6.5 Legal Basis and International Framework

It can be seen from the uploaded documents that the international copyright regime does not have a single rule regarding exhaustion. Instead, it gives the states the freedom to choose their

⁹⁰ Case C-200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH*, 1998 E.C.R. I-1953.

⁹¹ Directive 2001/29/EC, art. 4(2), 2001 O.J. (L 167) 10.

⁹² Consolidated Version of the Treaty on the Functioning of the European Union art. 34, 2012 O.J. (C 326) 47.

own rules for this matter. The Berne Convention is an example of one of the most ancient international copyright regimes that did not even mention exhaustion in any way.⁹³ This implies that exhaustion was developed through national legislation and jurisprudence more than by means of international conventions. According to Article 6 of the TRIPS agreement, exhaustion of rights is discussed as a special topic.⁹⁴ It is seen from the uploaded documents that TRIPS does not enforce any specific approach toward exhaustion. Instead, TRIPS gives the right to exhaustion discretionarily to the member states, leaving them free to decide whether they would follow the principle of national exhaustion, international exhaustion, or regional exhaustion. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty both acknowledge the principle of exhaustion but give discretionality to the member states in deciding the scope of exhaustion.⁹⁵

2.6.6. Comparative Analysis of the Three Models

These forms of exhaustion vary in terms of the geographical reach involved in exhausting the rights of copyright owners. While national exhaustion is very restrictive since it involves exhausting rights within one single state, regional exhaustion is characterized by exhaustion within a specified group of states. On the other hand, international exhaustion involves exhausting rights all over the world. There are pros and cons associated with each form of exhaustion. National exhaustion gives copyright owners control over prices and distribution of their products, but it hinders trading and creates higher prices. International exhaustion helps encourage trade and competition, but it means losing control over the markets. In addition, regional exhaustion is a balanced form because it encourages freedom of trade within the region but still maintains some measure of control over imports from outside regions. The documents show that the choice of form of exhaustion results from a balance between protecting the interests of copyright owners and protecting the interests of consumers and the general public.

2.6.7 Impact on Trade and Market Structure

These forms of exhaustion vary in terms of the geographical reach involved in exhausting the rights of copyright owners. While national exhaustion is very restrictive since it involves

⁹³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886.

⁹⁴ TRIPS Agreement art. 6, Apr. 15, 1994.

⁹⁵ WIPO Copyright Treaty, Dec. 20, 1996; WIPO Performances and Phonograms Treaty, Dec. 20, 1996.

exhausting rights within one single state, regional exhaustion is characterized by exhaustion within a specified group of states. On the other hand, international exhaustion involves exhausting rights all over the world. There are pros and cons associated with each form of exhaustion. National exhaustion gives copyright owners control over prices and distribution of their products, but it hinders trading and creates higher prices. International exhaustion helps encourage trade and competition, but it means losing control over the markets. In addition, regional exhaustion is a balanced form because it encourages freedom of trade within the region but still maintains some measure of control over imports from outside regions. The documents show that the choice of form of exhaustion results from a balance between protecting the interests of copyright owners and protecting the interests of consumers and the general public.⁹⁶

This concept of exhaustion has been implemented differently in various jurisdictions using national exhaustion, regional exhaustion, or international exhaustion models. The model will determine the extent of control exercised by the copyright owners on distribution of the copies made following the initial transfer of ownership of the copy. From the uploaded documents, we note that there is no single approach applied universally when it comes to exhaustion. This means that every country is free to choose the model that fits its economy the most. In national exhaustion, the owner of the right has control only over his country, while in regional exhaustion, the rights extend over a specific region. International exhaustion extends the scope of exhaustion worldwide. There is the need to find a balance between the rights of the copyright owners and those of other stakeholders, including consumers, traders, among others. Exhaustion plays a crucial role in the pricing strategy and distribution of copyrighted works. Right is rather complicated. From the attached documents, it becomes clear that there are many approaches towards the problem of exhaustion in international copyright instruments including Berne Convention, TRIPS Agreement, and WIPO Copyright Treaty (WCT). It should be pointed out that these instruments fail to provide one global solution to the matter but give way for countries to develop their own stance.

2.7.1 The Berne Convention and the Absence of Exhaustion

The Berne Convention for the Protection of Literary and Artistic Works is one of the oldest and most prominent international agreements related to copyright.⁹⁷ Nonetheless, it can be seen

⁹⁶ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights* 68 (2007).

⁹⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris July 24, 1971.

from the uploaded materials that the Berne Convention fails to mention the doctrine of exhaustion at all.⁹⁸ In other words, the omission is crucial, and it highlights the fact that, initially, exhaustion was not viewed as one of the key aspects of international copyright law.⁹⁹ In fact, the Berne Convention mainly deals with the protection of authors' rights, such as the right of reproduction, translation, and performance.¹⁰⁰ It lays down minimum standards of protection and provides the list of the rights, which must be given to authors in member countries.¹⁰¹ Nonetheless, there is no provision regulating the distribution right in terms of exhaustion.¹⁰² It can be concluded from the documents attached that the fact that exhaustion was left out of the Berne Convention is connected to the time when the convention was formed. Then, the priority of the authors was to ensure the protection of authors regardless of any physical distribution of copies. Not being regulated in such a way by an international instrument made it possible for states to form their legislation in regard to exhaustion. This has also led to greater variation in exhaustion rules.

2.7.2 The TRIPS Agreement and Flexibility in Exhaustion

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is another important step forward for international copyright laws.¹⁰³ In contrast to the Berne Convention, TRIPS mentions the question of exhaustion in a specific way – however, only partially and flexibly. According to the information provided in the attached documents, Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) stipulates that exhaustion should be treated by the member states independently.¹⁰⁴ In other words, each country can decide for themselves whether its exhaustion will be national, regional, or international in nature.¹⁰⁵ As stated by the UNESCO document, TRIPS neither sides nor discusses exhaustion, leaving it to each state's jurisdiction. Thus, this is yet another characteristic of the agreement which makes it flexible. While this is so, TRIPS also identifies some specific fundamental principles that should be adhered to, including national treatment

⁹⁸ Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights* 135 (2d ed. 2006).

⁹⁹ Daniel J. Gervais, *The TRIPS Agreement: Drafting History and Analysis* 210 (4th ed. 2012).

¹⁰⁰ Berne Convention, *supra* note 1, arts. 8–11.

¹⁰¹ *Id.* arts. 1–21.

¹⁰² Silke von Lewinski, *International Copyright Law and Policy* 160 (2008).

¹⁰³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

and most favoured nation treatment.¹⁰⁶ Such principles involve the obligation for countries to accord domestic and international right owners the same treatment and to refrain from any form of discrimination between trading nations. Nevertheless, under these constraints, there is considerable flexibility in determining the exhaustion policy. The uploaded documents further indicate that TRIPS addresses the issue of intellectual property rights in an international trading system. Although TRIPS provides for increased protection and enforcement of these rights, it does not enforce stringent requirements on exhaustion. This has been done in consideration of the differing needs of the participating nations

2.7.3 The WIPO Copyright Treaty (WCT) and Related Instruments

Both WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) constitute modern trends within international copyright law in respect to new technologies.¹⁰⁷ As stated by the uploaded documents, these treaties do recognize exhaustion, but at the same time do not introduce any obligatory rule regarding the matter.¹⁰⁸ In particular, Articles 6(2) of the WCT and Article 8(2) of the WPPT address issues related to exhaustion of distribution rights.¹⁰⁹ According to these rules, states can establish criteria under which distribution rights would become exhausted after the initial sale/transfer of the product.¹¹⁰ As the materials indicate, treaties provide for the possibility to exhaust copyright protection nationally, regionally or internationally, just like TRIPS does. One crucial provision of the WCT is the Agreed Statement on Articles 6 and 7, which states that exhaustion does not apply to intangible reproductions but applies exclusively to tangible copies. Therefore, exhaustion is applicable to tangible goods that are capable of being placed in the market. Furthermore, the Agreed Statement makes it clear that digital transmission does not constitute exhaustion under the traditional doctrine. The two treaties have created the “making available” right in digital networks.¹¹¹ The making available right gives copyright owners the power to regulate the distribution of their works online. The right is distinct from the distribution right in the sense that it is not exhausted. Unlike the distribution right, the making available right does not involve transferring tangible copies.

¹⁰⁶ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights* 65–67 (2007).

¹⁰⁷ TRIPS Agreement arts. 3–4.

¹⁰⁸ WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

¹⁰⁹ *Id.*

¹¹⁰ WIPO Copyright Treaty art. 6(2); WPPT art. 8(2).

¹¹¹ *Id.*

2.7.4 Interaction Between International Frameworks and National Laws

According to the documents attached to this post, the international legal regime does not establish a standardized system of exhaustion, but rather operates in connection with the domestic law.¹¹² It is significant that such interaction permits flexibility, but it also results in divergence between legal systems.¹¹³ In other words, national exhaustion may be implemented by some states to serve the purpose of protecting their domestic markets, whereas international or regional exhaustion may be used by other states in order to stimulate commerce. The international legal regime lays down a basic framework within which the exhaustion regime can be adopted. For instance, minimum standards of copyright protection should be ensured by each country, but matters like exhaustion remain at the discretion of the state. It should be admitted that such a legal regime has both merits and demerits. Thus, states have an opportunity to make necessary adaptations to their own laws, but there is also some ambiguity and inconsistencies in the area of international trade.

2.7.5 Role of International Law in the Digital Context

It can be seen from the uploaded materials that the relevance of international law in dealing with exhaustion in the digital environment is on the rise. Exhaustion of rights has traditionally been applied to physical copies. Digital technologies have made it more difficult to deal with the situation.¹¹⁴ In an attempt to solve these problems, the WIPO treaties have introduced the making available right, which has not been applied to digital copies. This means that the application of exhaustion to digital copies has continued to create controversies.¹¹⁵ There is no clear direction from the international legal framework regarding how these problems can be addressed. The uploaded documents indicate that there may not be any uniformity in the rules adopted internationally to regulate digital exhaustion.

2.7.6 Comparative Significance of the Three Frameworks

In turn, the Berne Convention, TRIPS Agreement, and WIPO Copyright Treaty perform their own specific functions within the international legal regulation of exhaustion. While the Berne Convention contains provisions on the fundamentals of copyright protection, it does not contain

¹¹² WIPO Copyright Treaty, Agreed Statement Concerning arts. 6 & 7.

¹¹³ Frederick M. Abbott et al., *International Intellectual Property in an Integrated World Economy* 312 (2019).

¹¹⁴ *Id.*

¹¹⁵ Mihály Ficsor, *The Law of Copyright and the Internet* 421 (2002).

any provisions on exhaustion.¹¹⁶ The TRIPS Agreement is the first international act that brings the issue of exhaustion into the international legal regulation and leaves wide discretion to national authorities.¹¹⁷ Meanwhile, the WIPO treaties continue to expand this regulatory system by taking into account digital realities. Thus, these documents create an international legal system that takes into account the significance of the institution of exhaustion but does not establish any rigid requirements.

It should be noted that the international legal regime concerning exhaustion is rather flexible and varied. The Berne Convention does not discuss the topic of exhaustion and gives an opportunity to solve this problem through national laws¹¹⁸. According to TRIPS, the matter of exhaustion is taken into account; however, states may make their own decisions about it. WIPO Copyright Treaty and other instruments take into consideration exhaustion, although they use certain restrictions. As can be seen from uploaded documents, it is clear that there are no common principles regulating exhaustion on an international level. Thus, the state is free to define its own regime of exhaustion of copyright. In general, the international system serves as a basis for comprehending exhaustion, yet there is considerable leeway available to accommodate national considerations. This dual nature of being both an asset and a liability has both positive and negative aspects to consider.

2.8 Judicial Development of the Doctrine

Exhaustion principle or doctrine, alternatively known as first sale doctrine, has been developed by judicial decisions made in different jurisdictions.¹¹⁹ Judging from the provided cases, it can be clearly observed that courts do have an important role in determining the limits of exhaustion doctrine. While laws may only provide a general framework for exhaustion doctrine, it is only through judicial interpretations that the implementation of exhaustion doctrine becomes apparent. Also, such a method illustrates the evolving nature of copyright law and its attempts at balancing conflicting interests between copyright holders and consumers.¹²⁰

¹¹⁶ Id.

¹¹⁷ Daniel J. Gervais, *supra* note 3, at 215.

¹¹⁸ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886

¹¹⁹ Id

¹²⁰ TRIPS Agreement art. 6.

2.8.1 Early Judicial Recognition in the United States

The judicial evolution of the First Sale Doctrine originated notably in America. As per the Indian paper uploaded, *Bobbs-Merrill Co. vs. Straus* (1908) is seen as the cornerstone of the First Sale Doctrine within the American framework of copyright law. In this case, there was an initial recognition of the rule that the owner's right to control his or her copy ceases upon its first lawful sale.¹²¹ Here, the publisher had attempted to enforce a resale price maintenance via printing a notice within the copyrighted book. However, the Supreme Court dismissed the publisher's effort and ruled that the copyright act did not confer on the owner any right over controlling the resale of a copy once it had been sold. It is noteworthy that the distribution right of the owner does not entail the right of controlling the subsequent distribution or movement of a copy. Consequently, the case laid down the fundamental principle of exhaustion within America. Here, the distribution right is seen to be extinguished or exhausted after the first sale. Furthermore, the decision indicated that no unilateral imposition of restrictions through notices can occur without any contractual agreement.

2.8.2 Development in European Union Jurisprudence

The exhaustion doctrine in Europe evolved based on the cases decided by the European Court of Justice (ECJ). As can be seen in the uploaded UNESCO document, the ECJ significantly influenced the evolution of the exhaustion doctrine in respect to the European Community. For instance, one of the most significant cases decided by the Court was that of *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH*, 1971. In this particular case, the Court stated that after lawful placing of the copyrighted goods into circulation within a Member State under the consent of the copyright owner, the distribution rights become exhausted in respect to the entire Community. According to the Court, the failure to allow exhaustion would have violated the principle of free movement of goods. This decision created a principle of exhaustion in respect to the entire Community, which became a cornerstone for European copyright law. Another example of a relevant case mentioned in the uploaded documents is *Musik-Vertrieb Membran GmbH v. GEMA* (1981). This case was concerned with whether further levies could be imposed upon the introduction of goods into the Community, which have already been sold in some other Member State under legal conditions. The Court held that imposing levies would be inconsistent with the idea of exhaustion and

¹²¹ *Bobbs-Merrill Co. v. Straus*, supra note 4.

would create impediments to trade. In other words, the Court reiterated that once copies had been sold in the Community with the permission of the copyright holder, no prohibition on further distribution could arise within the Community. Therefore, it can be observed that the exhaustion principle was applied by the Court for promoting economic unification in the Community.

2.8.3 Limitation of Exhaustion: Distinction Between Goods and Services

Judicial development has also defined boundaries for the exhaustion doctrine. As seen from the uploaded UNESCO document, the case of Coditel I (1980) has been used by the ECJ to distinguish the distribution of tangible objects from the provision of services. Here, the question was about whether the right of performance of a cinematographic work could be regarded as exhausted in the course of its first performance. The Court ruled that exhaustion is not applicable to performance rights since they presuppose the repeated use of works in contrast to the sale of one copy. As the Court put it, the nature of goods is quite different from the nature of performances as there can be several instances of their repetition without having an impact on their quantity. Hence, it follows that the particular object of copyright is never exhausted by one act of distribution. This distinction is crucial for the legal treatment of intellectual property since it restricts exhaustion exclusively to tangible goods.

2.8.4 Judicial Approach to Rental Rights

A further important restriction based on exhaustion was made possible through interpretation of the legal concept of rental by the courts. According to the uploaded material, courts have interpreted rental to be a type of commercial exploitation that does not fall under exhaustion. For instance, according to a case involving Warner in 1988, the ECJ ruled that laws can be enacted in order for the copyright holder to regulate rental of video cassettes, even if the cassette was sold in another Member State. This was because there may be economic effects arising out of rental and resale that were not the same. From this, it is evident that exhaustion was not about temporary possession of an object, but about the transfer of ownership.

2.8.5 Judicial Development in Relation to Software

Further discussion on judicial developments regarding exhaustion concerns computer software. In particular, it is essential because software includes characteristics of tangible and intangible distribution. In the article dedicated to digital exhaustion, the court ruling used is related to the

case of *UsedSoft GmbH v. Oracle*¹²². It concerns the question whether exhaustion can apply to the resale of licenses. The court ruled that depending on the situation, exhaustion can take place when it comes to downloading software. This decision expanded the scope of the traditional exhaustion doctrine but remained applicable only to very specific situations and cannot serve as a rule regarding exhaustion of other digital products. Contrasting the mentioned ruling is the decision of the US court in the *ReDigi* case, where the applicability of the doctrine to digital music files was refused. As a result, the transfer of digital files does not imply exhaustion since it constitutes reproduction rather than exhaustion. Thus, the discussed topic demonstrates uncertainty in judicial developments related to digital exhaustion.

2.8.6 Judicial Treatment of Territorial Limits

The judiciary has been involved in delimiting the scope of territoriality of exhaustion. As seen in the UNESCO document provided above, there is an instance of the ECJ ruling in *Polydor v. Harlequin* (1982). In this case, it was decided that exhaustion only occurs within the European Community, but not for goods coming into the community from third states.

Through this decision, it was affirmed that the principle of exhaustion is limited to the region concerned, and not applicable to third states. It was stated in the decision that allowing exhaustion with respect to third states undermines the internal market. This is similar to what happened in the *Microsoft* case mentioned in the provided documents.

2.8.7 Role of Courts in Adapting the Doctrine

From the given documents, it is evident that courts consider more than just exhaustion when making decisions. They take exhaustion and develop its applications based on the presence of particular aspects. For example, the evolution of the technological era has forced courts to interpret exhaustion in light of technology. The question arises regarding whether exhaustion in the context of digital distribution should be interpreted the same way it was with respect to physical distribution. *UsedSoft* case and *ReDigi* case illustrate this debate.¹²³ Parallel imports, licensing, and the distinction between possession and use are some of the other issues that are considered in the application of this doctrine.

¹²² Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R.

¹²³ *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018).

2.8.8 Overall Contribution of Judicial Development

Judicial construction of the First Sale Doctrine has been important in its current development. The courts have determined that the doctrine provides for an exhaustion of the distribution right on the first sale of copies of copyrighted material, subject to some exceptions and limitations. In judicial decisions, the doctrine was made sure not to undermine the interests of copyright holders but to promote free trade and efficiency in the marketplace at the same time. However, courts have faced difficulties in implementing the doctrine under the new technological circumstances, despite its adaptation to changing conditions of economic life.

The uploaded materials demonstrate the importance of judicial interpretation in the current application of the doctrine. Judicial interpretations will keep developing in response to emerging new cases.

One of the most important aspects of the development of the doctrine of exhaustion was the contribution of the courts in defining the principle in accordance with copyright laws. As can be seen from the analysis of court rulings in the United States on the issue, the doctrine of exhaustion originated from the court ruling in *Bobbs-Merrill*. In addition, the European Union has played a significant role in developing the principles of the doctrine. Courts in Europe have managed to outline the main aspects of the doctrine such as its applicability only for distribution of tangible copies, non-application to performance or reproduction of the copyrighted material, and territorial and commercial boundaries. Moreover, it should be noted that courts have already started dealing with the problem of applying the doctrine in relation to digital technologies, but there is still no clear approach in terms of copyright protection. It should be concluded that the current form of the doctrine of exhaustion is the outcome of judicial interpretation.

CHAPTER - 3

Chapter 3: Digital Distribution and Challenges to Copyright Exhaustion

3.1 Evolution of Digital Distribution Systems

Development of digital technology has played a fundamental role in changing the process of distribution of copyright materials.¹²⁴ It is evident from the uploaded documents that the existing systems of copyright laws were developed bearing in mind distribution of tangible forms of documents like books, audio cassettes, records, and so forth.¹²⁵ But, now with the advancement in digital technology and introduction of the Internet, there have been changes in the system of distribution.¹²⁶ This has greatly affected the concept of doctrine of exhaustion because it was designed to operate within the physical world.¹²⁷

3.1.1 Transition from Physical Distribution to Digital Networks

The relationship between distribution and copying in the conventional copyright system was clear-cut since copying entailed production and distribution of copies in physical form.¹²⁸ Physical copies of books, CDs, and any other form of copyrighted material were manufactured, sold, and circulated as physical objects¹²⁹. The exhaustion rule worked effectively in such a setting since the copying act was the transfer of an object.¹³⁰ As indicated in the uploaded UNESCO report, digital reproduction entails the transfer of works via digital network.¹³¹ Therefore, unlike the conventional mode, there is no need for production and physical transfer of copies.¹³² Instantaneous availability and transfer of the works is the core of the digital reproduction process.¹³³ Unlike physical copies, digital copies do not require manufacturing, storage, or even physical transfer. This makes the whole process faster and convenient. However, the digital reproduction process has brought about several challenges concerning copyright protection laws.

¹²⁴ WIPO, World Intellectual Property Report: The Changing Face of Innovation 45 (2011).

¹²⁵ Paul Goldstein & P. Bernt Hugenholtz, International Copyright: Principles, Law, and Practice 265 (3d ed. 2013).

¹²⁶ Id.

¹²⁷ Mihály Ficsor, The Law of Copyright and the Internet 421 (2002).

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ UNESCO, Copyright and Digital Technologies 22 (2019).

¹³² Id.

¹³³ Id.

3.1.2 Dematerialisation of Copyrighted Works

One of the most significant features of digital distribution is dematerialization of works.¹³⁴ According to the uploaded documents, digital technologies provide an opportunity for works to exist in an immaterial format, without physical existence at all.¹³⁵ Thus, the connection between copyright protection and tangible objects becomes much looser than before. In the physical realm, the exhaustion principle is applied because the property in a tangible item changes during distribution. On the other hand, in the digital realm, such tangible items cannot be transferred to someone else because works are accessed by people using digital copies only. According to UNESCO, digital technologies ensure the ability to produce a copy of work at a very low cost with perfect reproduction.¹³⁶ Thus, one copy becomes much less valuable compared to those in the physical realm since it is possible to produce an indefinite amount of them.¹³⁷ It becomes evident that digital technologies pose a challenge to the understanding of distribution.

3.1.3 Digital Transmission and Continuous Access

Continuous access is another characteristic trait of digital distribution.¹³⁸ According to the uploaded materials, in most cases digital materials are distributed using online sources where the user has an opportunity to access a specific item whenever needed.¹³⁹ However, according to this method of distribution, the user will not receive an individual copy of the item since he/she will be able to have temporary access to it via streaming and other Internet services. It is easy to understand that this distribution differs significantly from the conventional practice of selling copies. As the UNESCO document suggests, digital distribution could be considered a repeatable process.¹⁴⁰ The difference between digital distribution and traditional sales consists in that there are no limitations for making this process repeatable.

¹³⁴ Ficsor, *supra* note 4, at 430.

¹³⁵ *Id.*

¹³⁶ UNESCO, *supra* note 8, at 25.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

3.1.4 Emergence of Online Platforms and File Sharing

With regard to digital distribution's development, there have been instances of the emergence of digital distribution platforms and file-sharing systems.¹⁴¹ According to the documents presented, some of the digital distribution file-sharing services include Napster, AudioGalaxy, and Kazaa, which enabled individuals to exchange digital content with one another. Using these platforms, users were able to share songs, movies, and computer software among others.¹⁴² As indicated in the UNESCO document, these types of platforms make it easy to transfer data from one user to another while downloading works. As a result, the mode of distribution and consumption of copyrighted works was greatly altered. The rise of file-sharing sites indicated that digital distribution does not necessarily have to take place via commercial means but could also be achieved using decentralized platforms.¹⁴³

3.1.5 Role of the Internet in Global Distribution

The role of the internet cannot be underestimated in relation to the development of systems of digital distribution.¹⁴⁴ From reading the uploaded documents, it can be seen that the use of digital means makes it possible for any creation to move across international borders effortlessly. The moment an author uploads their work, it becomes accessible to all the users in other countries immediately.¹⁴⁵ As a result, copyright regulation faces certain complications due to its reliance on the principle of territory. The geographic limitations exist in the material world, but not in the digital one.¹⁴⁶ The document issued by UNESCO points out that digital distribution is usually a process of cross-border access, thus complicating the problem of the application of the principle of exhaustion to such an environment.

3.1.6 Convergence of Distribution, Reproduction, and Communication

The development of digital distribution also affected the lines of division between the various copyrights. As far as the conventional approach was concerned, distribution, reproduction, and public performance were independent actions.¹⁴⁷ But under the circumstances provided by

¹⁴¹ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Goldstein & Hugenholtz, *supra* note 2, at 300.

¹⁴⁵ Id.

¹⁴⁶ UNESCO, *supra* note 8, at 35.

¹⁴⁷ Ficsor, *supra* note 4, at 440.

digitalization, the line of demarcation between these actions tends to fade. According to the documents provided, digital distribution includes both distribution and reproduction.¹⁴⁸ With the transfer of a digital file, a duplicate is automatically produced at the recipient's end. It shows that the process of distribution is connected with reproduction. Moreover, the digital form of distribution also includes the right of communication to the public. This fact is illustrated by the UNESCO paper, which indicates that the convergence of different copyright rights due to digital technologies poses difficulties for applying traditional concepts. As can be seen, this phenomenon makes it difficult to implement the traditional idea of exhaustion.¹⁴⁹

3.1.7 Impact on Traditional Legal Concepts

Indeed, changes in the way distribution systems functioned have significantly affected many legal principles, including the principle of exhaustion.¹⁵⁰ It is evident from the presented documents that traditional understanding of exhaustion was linked with transfer of possession of the copy. However, in the case of digital distribution, the traditional concept does not work well, since there is often no such thing as transfer of possession.¹⁵¹ Indeed, individuals are provided access to works and not copies of these works in the process of digital distribution. According to the document issued by UNESCO, digital distribution can be considered as distribution of services, rather than distribution of goods. This point is rather important, as exhaustion relates specifically to goods and not to services. Thus, changes in the field resulted in discrepancy between laws and technologies.¹⁵²

3.1.8 Continuing Relevance of Traditional Principles

Even in spite of these developments, from what can be seen from the uploaded materials, traditional rules of copyright law still hold relevance.¹⁵³ The idea of exhaustion will still be highly relevant in terms of regulation of distribution of copies. Nonetheless, such regulation within the scope of the digital environment is subject to very thorough considerations. It is necessary to carefully consider the way to combine interests of copyright holders and needs for

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

¹⁵² Ficsor, *supra* note 4, at 445.

¹⁵³ UNESCO, *supra* note 8, at 40.

innovation. The development of digital means of distribution does not deprive the idea of exhaustion from relevance, but on the contrary emphasizes its need.¹⁵⁴

3.1.9 Conclusion

The evolution of the digital distribution system can be considered a revolution in the field of copyrighted works circulation and accessibility.¹⁵⁵ With the transition from tangible to intangible works, there appear problems connected to the application of the principle of exhaustion of copyright works in the digital environment.¹⁵⁶ As seen from the attached papers, digital distribution has such distinctive features as dematerialization, perpetual access, worldwide scope, and the combination of various types of copyright. It becomes quite hard to use traditional legal concepts in the digital era. Nevertheless, the evolution of digital technologies also opens up new possibilities for accessing and distributing copyrighted works. The task for copyright law is to find the right balance between its own purposes and principles and the realities of modern times. In this context, the evolution of digital distribution systems lays the groundwork for understanding the general problems connected with exhaustion of copyrights.

3.2 Licensing Models vs Ownership in Digital Content

The emergence of digital technologies has drastically affected the process of distribution and availability of copyrighted materials.¹⁵⁷ The most significant change in this regard, discussed in the provided readings, is the replacement of traditional ownership of copies with licensing in the digital format.¹⁵⁸ Such a move poses major difficulties when applying the doctrine of exhaustion, which implies the transfer of ownership after the initial sale.¹⁵⁹ The notion of ownership becomes irrelevant in the digital context since access is governed by contracts rather than ownership.

¹⁵⁴ Goldstein & Hugenholtz, *supra* note 2, at 310.

¹⁵⁵ *Id.*

¹⁵⁶ Ficsor, *supra* note 4, at 450.

¹⁵⁷ World Intellectual Property Organization (WIPO), *World Intellectual Property Report 2019: The Geography of Innovation* 78 (2019).

¹⁵⁸ Julie E. Cohen et al., *Copyright in a Global Information Economy* 395 (4th ed. 2015).

¹⁵⁹ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

3.2.1 Traditional Ownership Model in Physical Works

Under the traditional framework of copyright law, distribution was done using physical copies of the work such as books, CDs, and DVDs.¹⁶⁰ From the uploaded materials, it is apparent that upon purchasing a physical copy of any work, the individual becomes the owner of that particular item.¹⁶¹ The possession provides complete freedom of use, resale, loaning, or transferring the physical copy. It is easier for the principle of exhaustion to apply in this case since the transfer of ownership forms its basis. Once a copyrighted work has been sold with the permission of the copyright holder, the distribution right of the same gets exhausted by the seller.¹⁶² Thus, the buyer enjoys freedom to utilize the copy without seeking permission from anyone. The separation of ownership of the object from that of the copyright in this case helps in striking a balance between property law and copyright law.¹⁶³

3.2.2 Emergence of Licensing Models in Digital Distribution

It is evident that there exists an entirely new business model, whereby the works are distributed through licenses and not sold as physical copies of products.¹⁶⁴ In this regard, the consumers of these products will be able to access and use these products only under certain conditions without owning any rights.¹⁶⁵ This is clearly illustrated in the Indian article, which notes that when it comes to digital files, the consumer receives licenses instead of owning the product. It is clear that regardless of the amount paid by users, which can be the same as a physical product, they will not obtain ownership of the digital file.¹⁶⁶ License models are prevalent when distributing items such as software, ebooks, and music. License is a form of contract, which provides consumers with access rights to the product based on certain conditions. The owner of the copyright remains in control of the product.¹⁶⁷

¹⁶⁰ Paul Goldstein & P. Bernt Hugenholtz, *International Copyright* 265 (3d ed. 2013).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

¹⁶⁵ *Id.*

¹⁶⁶ Julie E. Cohen et al., *supra* note 2, at 400.

¹⁶⁷ *Id.*

3.2.3 Nature and Features of Digital Licensing

Digital licensing systems have several unique attributes that distinguish them from ownership-based systems.¹⁶⁸ First, it can be seen from the uploaded documents that licenses usually provide the user with limited rights, meaning that the user has no right to sell or pass the license on to another party.¹⁶⁹ Furthermore, the licenses limit the ability of the user to copy, redistribute, or modify the content. These limitations are usually included in the terms of the contract signed between the licensee and licensor.¹⁷⁰ Thus, the user enjoys fewer rights compared to an owner who has unlimited rights over his property. Finally, digital licenses allow accessing the content for a limited period or under certain conditions. In particular, the user may not be able to access the material if he terminates the subscription or violates some other requirement stated in the contract.

3.2.4 Impact on the Doctrine of Exhaustion

Licensing changes the whole essence of exhaustion doctrine in relation to copyright law.¹⁷¹ The exhaustion doctrine presupposes the fact that the moment the copyright holder transfers his rights of ownership of the copies, he is no longer able to control their use. Nevertheless, digital licenses do not involve the transfer of ownership at all.¹⁷² As can be seen from the documents provided, the nature of digital products does not allow applying the exhaustion principle to them since digital documents can only be licensed, not sold. It means that the copyright owner still has control over the documents as long as licensing remains valid, and he is free to limit resale and other actions involving the transfer of documents. It seems to pose a serious problem because the very principle of exhaustion was developed with a different copyright system in mind, while digital distribution works according to a completely different logic.¹⁷³

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Perzanowski & Schultz, Digital Exhaustion, 58 UCLA L. Rev. 889, 895 (2011).

¹⁷² Id.

¹⁷³ Id.

3.2.5 Misconception of Ownership in Digital Content

Many customers think that if they buy a particular digital product, say, an e-book or a music file, then they are acquiring it just like any other tangible good.¹⁷⁴ This is far from reality. According to the Indian reading, most customers are not aware of the nature of the purchase they make when purchasing digital items. They end up buying only access to a particular digital item, which is limited due to the license attached to it.¹⁷⁵ This creates issues as people may end up thinking that they can sell or distribute the digital item to others because they purchased it but will find themselves at crossroads due to the terms attached to the license agreement.

3.2.6 Role of Contracts in Digital Distribution

It is imperative to note that contracts have an important function within digital licensing.¹⁷⁶ From the uploaded documents, we learn that it is through contracts that the rights and responsibilities of users are set as opposed to through property rights as it was before.¹⁷⁷ Through the use of contracts, copyright owners retain a great deal of control over digital content. They can place various conditions on users that could not be placed using the conventional concept of property rights. Such conditions could include limiting access to certain digital content to specific devices or even restricting time periods for access. Contract law replaces copyright law when digital licenses are involved. There is no need for exhaustion anymore since it is the content of the contract that determines user rights.¹⁷⁸

3.2.7 Economic and Practical Implications

It appears that the change from ownership to licensing has brought about some legal uncertainties.¹⁷⁹ The traditional concept of exhaustion seems to find no easy place in the digital era, nor does there seem to exist a common understanding of its application. There has been inconsistency in the way courts have handled the issues regarding exhaustion in the digital world. Some courts have tried to apply the exhaustion principle to digital media in certain situations while others have refused to follow suit. It is clear that there needs to be legal reforms in this case. The current system can perhaps be adjusted to accommodate the problems in the

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Cohen et al., *supra* note 2, at 410

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Perzanowski & Schultz, *supra* note 15, at 910

digital age, but such legal reforms would require careful considerations of the needs of the two parties involved.¹⁸⁰

3.2.8 Legal Uncertainty and Need for Reform

The uploaded documents suggest that the move from ownership to licensing has brought about legal uncertainty.¹⁸¹ The principle of exhaustion does not apply well to the digital world, and there is no clear position regarding its application. Jurisdictions differ in how they deal with this problem, resulting in legal inconsistency.¹⁸² Courts have tried applying exhaustion in some instances in the digital world, but they have failed in others. Legal reform is necessary to deal with the above problem. The current system might require some modification to account for the changes in the new world. However, care needs to be exercised when making any modifications.¹⁸³ Transition from ownership to licensing is undoubtedly one of the biggest transformations in the sphere of digital copyright. It is evident from the uploaded documents that now digital goods are spread with the help of licenses and not sales, which significantly affects the use of the principle of exhaustion in its relation to digital materials. In fact, the use of the licensing scheme gives copyright holders a possibility to maintain control over the content and set some restrictions for using it. Although such an approach brings significant benefits for copyright holders, it makes the position of users weaker as well. This way, it is quite clear that the differences between the ownership and licensing have great significance while discussing challenges faced by First Sale Doctrine in the era of digitalization.

3.3 Digital Copying and the Reproduction Right

The evolution of digital technology has led to substantial changes in the methods by which copyrighted materials can be accessed, utilized, and distributed.¹⁸⁴ One of the major legal issues that arise in connection with digital technologies as discussed in the documents provided for upload is the issue of digital reproduction vis-à-vis the reproduction right.¹⁸⁵ The principle of exhaustion in the traditional copyright system applies exclusively to the distribution right and

¹⁸⁰ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).

¹⁸¹ Id.

¹⁸² Perzanowski & Schultz, supra note 15, at 920.

¹⁸³ Cohen et al., supra note 2, at 420.

¹⁸⁴ World Intellectual Property Organization (WIPO), World Intellectual Property Report 2019: The Geography of Innovation 82 (2019).

¹⁸⁵ Mihály Ficsor, The Law of Copyright and the Internet 421 (20

leaves the reproduction right untouched.¹⁸⁶ On the other hand, digital transactions essentially involve reproductions of the material, thus affecting the reproduction right.¹⁸⁷

3.3.1 Nature of the Reproduction Right in Copyright Law

Reproduction is among the fundamental exclusive rights accorded to the copyright owner.¹⁸⁸ According to the uploaded materials, the copyright owner has the right to control the production of duplicates of their creation in any format.¹⁸⁹ It is pertinent to the production of both physical and digital duplicates and is regarded as vital for safeguarding the economic interest of the author. Reproduction and distribution have historically been regarded as two distinct processes.¹⁹⁰ In particular, while reproduction refers to the production of the duplicate, distribution entails the delivery of the duplicate to another party. Exhaustion only concerns itself with the distribution right and not the reproduction right. This implies that once the first sale occurs, the subsequent owner cannot make reproductions of the work without authorization. It was easy to distinguish between the two in the physical environment since redistribution did not involve reproduction; the identical object was handed over to the next owner. However, in the digital realm, the distinction becomes problematic.¹⁹¹

3.3.2 Digital Copying as an Inherent Process

The documents uploaded highlight that digital copying is an inevitable feature of digital technology. Every time there is downloading or transferring of digital files or even viewing of such files, a copy is made whether temporary or permanent¹⁹². This indicates that there is a strong correlation between digital distribution and copying. As an illustration, every time there is downloading of a file from the internet, a copy is automatically made on the device of the user.¹⁹³ Even streaming will make use of temporary copies saved in the computer. All these instances of copying are covered by the reproduction right. This feature of digital technology poses a serious problem for copyright law because every instance of dealing with digital works entails copying.¹⁹⁴ The application of exhaustion is therefore problematic in this context since

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886.

¹⁸⁹ Id.

¹⁹⁰ Paul Goldstein & P. Bernt Hugenholtz, *International Copyright* 267 (3d ed. 2013).

¹⁹¹ Id.

¹⁹² Ficsor, *supra* note 2, at 435.

¹⁹³ Id.

¹⁹⁴ Id.

exhaustion doctrine is premised on the transfer of existing copies and not creation of new copies.¹⁹⁵

3.3.3 Conflict Between Exhaustion and Reproduction

when there is distribution through digital media, there must first be an act of reproduction.¹⁹⁶ This creates an immediate challenge in that all acts of transfer involving digital media involve reproduction, which requires the consent of the copyright holder. In this case, the exhaustion doctrine would be useless since the copyright holder can use his or her reproduction rights irrespective of exhaustion of distribution.¹⁹⁷ These challenges have been discussed on various occasions in the uploaded files and show how inappropriate the exhaustion concept is with regard to digital media since reproduction has to occur before distribution.¹⁹⁸

3.3.4 Perfect and Infinite Reproduction

Moreover, perfect and endless reproduction is an intrinsic attribute of digital copying.¹⁹⁹ According to the UNESCO uploaded document, digital technologies permit creating duplicates of works without any reduction in their quality. Such an approach differs significantly from traditional physical copying, where problems with degradation can arise. Perfect and cheap reproductions mean that there are more chances for unauthorized copying and circulation of information.²⁰⁰ In order to protect copyright holders, the concept of the reproduction right becomes more and more topical. However, such an inherent property of digital copies complicates justifying the necessity of exhaustion in the realm of digital technologies since any unrestricted transferability will result in endless reproduction and distribution, negatively affecting the work market.²⁰¹

3.3.5 Temporary Copies and Technical Reproduction

The uploaded documents also address the problem of temporary copies. Such copies arise as a result of the regular operation of digital technologies.²⁰² Temporary copies may be held in

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ UNESCO, Copyright and Digital Technologies 28 (2019)

²⁰⁰ Id.

²⁰¹ Id.

²⁰² Id.

RAM, cache, or any other temporary storage facility while the digital object is used. These copies are needed for the use of digital work. Streaming videos require temporary copies to be made.²⁰³ The act of making such copies is considered an auxiliary one, and it does not have any economic value per Nevertheless, it remains covered by the exclusive right of reproduction. This has led to the creation of exceptions in the field of copyright law allowing for such acts to be performed without infringement upon copyrights.²⁰⁴

3.3.6 Judicial Interpretation in Digital Context

Courts have dealt with the matter of digital copying differently.²⁰⁵ For instance, in the US, one such case is ReDigi.²⁰⁶ The court ruled that transfer of digital music files constituted reproduction since it created a new copy on the recipient's device. Therefore, in such a case, First Sale Doctrine would not apply. It can be seen that the decision represents a strict interpretation of the right of reproduction.²⁰⁷ It recognizes that digital transfer cannot be considered as equivalent to resale, which makes the First Sale Doctrine inapplicable. On the other hand, the judgment passed by the European Court of Justice in the case of UsedSoft showed some flexibility in relation to software. It ruled that even if there were digital transfers of the software, it did not amount to a violation of distribution rights. Nonetheless, the case involved certain restrictions. It is clear that the link between digital copying and exhaustion continues to elude judicial resolution.

3.3.7 Reproduction Right as a Tool of Control

From the documents that have been submitted, it is evident that the right of reproduction has emerged as one of the most powerful instruments in the hands of copyright holders, especially when controlling digital distribution of their content.²⁰⁸ This is because reproduction entails making copies, which provides an opportunity for copyright holders to exercise control over their copyrighted material after it has been put out in the market. For instance, they can stop users from distributing or selling the digitalized copies through exercising their rights to

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018).

²⁰⁶ Id

²⁰⁷ Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., 2012 E

²⁰⁸ Ficsor, supra note 2, at 450.

reproduction.²⁰⁹ This differs significantly from the past, whereby exhaustion left copyright holders powerless once their works had been sold off the first time.

3.3.8 Impact on Users and Market Practices

The relationship between digital copying and the right of reproduction has important consequences for the user and for market behavior.²¹⁰ According to the uploaded documents, the rights of users in relation to the transfer or resale of the digital product is very limited since both processes entail the reproduction of the material. In terms of creating a market for digital products, this situation limits possibilities, especially considering the impossibility of reselling or transferring any other digital material without violating the copyright law. The user might perceive that he or she has bought a certain product when, legally speaking, this is not the case.²¹¹

3.3.9 Challenges for Legal Framework

It can be seen from the materials provided above that the conventional legal system has not been fully prepared to tackle the problems arising out of digital copying.²¹² The theory of exhaustion was based on the premise that distribution and reproduction were two distinct things. However, in the digital age, there is a degree of intersection between distribution and reproduction, which makes it difficult for conventional laws to be applicable to the current scenario. Issues like whether digital copies should be considered a form of distribution or reproduction and whether the theory of exhaustion would be relevant need to be addressed. This has created a lot of discussion among legal theorists and policymakers regarding the best way to tackle these problems.²¹³

3.3.10 Need for Adaptation and Future Considerations

From the documents that have been uploaded, it can be seen that there is an imperative to make changes to the law to reflect the issues that have been raised by digitization. It is possible that the doctrine of exhaustion will have to be modified to fit into the digital world. However, there

²⁰⁹ Id.

²¹⁰ Perzanowski & Schultz, *Digital Exhaustion*, 58 *UCLA L. Rev.* 889, 905 (2011).

²¹¹ Id.

²¹² Goldstein & Hugenholtz, *supra* note 7, at 270.

²¹³ Id.

needs to be careful consideration of how the rights of both the owner of the work and the user can be protected. This is because copyright owners require protection from infringement, but users must be allowed some reasonable use and transfer of the digital work²¹⁴.

Copying in the digital domain and the right of reproduction make up one of the most serious problems faced in the practical implementation of the doctrine of exhaustion. Indeed, as evidenced by the above uploads, in the digital domain reproduction is a necessary element of the distribution of works; therefore, it is impossible to implement certain traditional rules in practice.²¹⁵ The right of reproduction provides copyright owners with the opportunity to preserve their rights concerning the use of digital copies of the work. However, it limits the possibilities of users and the emergence of a secondary market of digital goods. Digital copying and the right of reproduction emphasize the necessity of updating current legislation in order to regulate copyright in the digital domain.

3.4 Streaming Services and the “Making Available” Right

The emergence of the streaming platform model represents a drastic shift in how copyrighted materials are consumed.²¹⁶ It is evident from the uploaded documents that digital technology has led to a shift in the approach to accessing copyrighted material by placing less emphasis on the ownership of a copy of such materials and more on access.²¹⁷ Using such streaming platforms allows one to access various copyrighted materials like movies, songs, among others, without having to download them or possess an actual copy.²¹⁸

3.4.1 Concept of Streaming in the Digital Environment

Streaming is the delivery of digitized content through the internet so that users can access the content in real-time but without saving any copy of it on their devices.²¹⁹ From the description of the uploaded files, streaming entails the delivery of continuous data so that users are able to enjoy or access the content at once. It is important to note that, unlike other forms of distributing content, there is no transfer of ownership of a copy when using streaming services.²²⁰ Instead,

²¹⁴ Perzanowski & Schultz, *supra* note 27, at 920.

²¹⁵ *Id.*

²¹⁶ World Intellectual Property Organization (WIPO), *World Intellectual Property Report 2019: The Geography of Innovation* 90 (2019).

²¹⁷ Julie E. Cohen et al., *Copyright in a Global Information Economy* 410 (4th ed. 2015).

²¹⁸ *Id.*

²¹⁹ UNESCO, *Copyright and Digital Technologies* 32 (2019).

²²⁰ *Id.*

people are allowed temporary access to the content through subscription models. This shows a total contrast between physical distribution and streaming since there is a transfer of a copy when distributing works physically. The emergence of streaming²²¹ services can be attributed to the evolution of technology and consumers' preferences. In most cases, users do not desire owning copies but accessing large databases of content.²²²

3.4.2 Nature of the “Making Available” Right

The making available right is one of the most significant rights under digital copyright laws. As the uploaded papers indicate, making available rights give the owner of copyright the ability to control the availability of the work to the public using digital channels.²²³ The right is linked closely to communication to the public. In the case of making available rights, copyright holders enjoy exclusive rights that enable them to make their works available in such a manner that members of the public have the ability to access those works by choice in terms of place and time.²²⁴ The right becomes important in streaming services, where individuals pick what they need to view. The making available right is mentioned in the WIPO Copyright Treaty (WCT) as an aspect of communication to the public.²²⁵ From the uploads, it becomes evident that the making available right is separate from the distribution right because there is no transfer of ownership of a copy.²²⁶

3.4.3 Distinction Between Distribution and Making Available

One of the important matters emphasized in the uploaded documents is the differences between the distribution right and the making available right.²²⁷ The distribution right refers to the process of the transfer of ownership of a copy of something, which can then be resold by the recipient after the exhaustion of ownership by the first seller. On the other hand, the making available right is when something can be accessed by others but the ownership of the copy is still retained by the owner.²²⁸ This means that streaming takes advantage of the making available right, since the consumer does not own the content that he/she streams. What makes

²²¹ Id.

²²² Id.

²²³ Mihály Ficsor, *The Law of Copyright and the Internet* 500 (2002).

²²⁴ Id.

²²⁵ WIPO Copyright Treaty art. 8, Dec. 20, 1996, 2186 U.N.T.S. 121.

²²⁶ Id.

²²⁷ Paul Goldstein & P. Bernt Hugenholtz, *International Copyright* 275 (3d ed. 2013).

²²⁸ Id.

this difference important is the fact that exhaustion only applies to the distribution right and not to the making available right, as there is no transfer of ownership when streaming.²²⁹ According to the uploaded documents, this difference is one of the most important reasons for the non-applicability of the First Sale Doctrine to streaming services.²³⁰

3.4.4 Continuous and Repeated Access to Content

The streaming process involves constant and repeated access to content, unlike the one-time transmission that occurs in the case of downloads.²³¹ As per the UNESCO document available online, digital products can simultaneously and repeatedly make the same content accessible to many individuals.²³² Thus, it becomes clear that the process of streaming differs considerably from the purchase of physical products since the former involves simultaneous use of the same product by various consumers. Unlike a physical product, there is no restriction imposed on how many people can simultaneously view or listen to the content provided by the service provider. Therefore, copyright holders can generate earnings from several individuals using their copyrighted material. However, the principle of exhaustion cannot be successfully applied to such services because its main idea is based on the concept of transferring property rights once.²³³

3.4.5 Role of Licensing in Streaming Services

From the uploaded papers, the way of conducting business by the streaming company includes licensing. In licensing, the copyright owners license the streamer to use the content in some ways.²³⁴ These licenses stipulate the conditions under which the user can use or access this material and its rights.²³⁵ Further, an agreement is made between the user and the company about the conditions for accessing the material. Licensing ensures that the owner retains control of his/her copyrighted works while earning from them.²³⁶ Additionally, the streamer will be in a position to provide lots of materials. Clearly, exhaustion does not hold here since licensing is involved, among others.²³⁷

²²⁹ Ficsor, supra note 8, at 505.

²³⁰ Id.

²³¹ UNESCO, supra note 4, at 35.

²³² Id.

²³³ Id.

²³⁴ Cohen et al., supra note 2, at 420.

²³⁵ Id.

²³⁶ Id.

²³⁷ Id.

3.4.6 Temporary Copies and Technical Processes in Streaming

Temporary copies are commonly made in the process of utilizing streaming technology. In this regard, it should be pointed out that according to the information provided, content is cached in order to facilitate content playback.²³⁸ Such copies are not economically valuable and they are considered incidental in nature. Nonetheless, they are covered under the category of reproductions under the Copyright Act. In order to protect the users of streaming technology from copyright infringement, several exceptions have been introduced by copyright laws.²³⁹ It can be said that this is one of the many complex issues surrounding copyright legislation related to streaming technology.²⁴⁰

3.4.7 Judicial Approaches to Streaming and Making Available

As seen from the attached documents, there have been several judicial rulings which distinguish between distribution and making available.²⁴¹ The interpretation of law in these cases has proved to be consistent with the view that streaming constitutes making available. Judicial opinions have always emphasized that streaming does not amount to any transfer of property and thus cannot be regarded as a sale. In this connection, it is not subject to the exhaustion principle. It can be concluded that digital access models have different implications as far as the law is concerned.²⁴²

3.4.8 Economic and Market Implications of Streaming

There are economic considerations involved in the use of streaming services. Based on the details obtained from the readings, copyright owners stand to gain from streams because they earn royalties from subscription systems or license arrangements.²⁴³ Compared to the earlier methods of payments where copyright owners received income through individual sales, they can now earn from multiple transactions by different individuals making use of the streaming service. Furthermore, consumers have changed their behavior as they prefer to have access to an expansive collection of contents rather than owning a single piece of work. Lastly,

²³⁸ UNESCO, *supra* note 4, at 38.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Ficsor, *supra* note 8, at 510.

²⁴² *Id.*

²⁴³ WIPO, *supra* note 1, at 95.

consumers cannot exhaust streams, meaning that they cannot sell the purchased goods to someone else.²⁴⁴

3.4.9 Challenges to the Application of Exhaustion

The attached documents make it clear that streaming services create substantial obstacles to the effective implementation of the doctrine of exhaustion.²⁴⁵ The fact is that there is no transmission of ownership and no copying involved in streaming, which means that the conditions required for exhaustion do not apply here. The right of making available provides copyright holders with unlimited control over access to their works.²⁴⁶ Thus, it is impossible to exhaust copyright in such cases. In other words, this case highlights the divergence of principles of copyright law from real-life situations when it comes to exhaustion. Exhaustion is highly relevant in the material world but irrelevant in the digital environment.²⁴⁷

3.4.10 Future Considerations and Legal Developments

With the development of the streaming service, certain issues regarding the future of copyright laws emerge.²⁴⁸ In light of the uploaded papers, it can be suggested that the existing legislation would need some adjustments in order to meet the challenges posed by the digital distribution. A discussion on the matter is taking place on whether the concept of exhaustion would have to be adjusted to cover digital materials or whether other legal terms would have to be introduced into the legislation.²⁴⁹ It needs to be emphasized that all modifications will have to be made while considering the needs of both the copyright owners and their users. One of the terms which is very likely to prevail in digital copyright laws is the making available right.²⁵⁰

The development of streaming services and the right of making them available marks the emergence of an entirely new trend in the distribution and accessibility of copyrighted material.²⁵¹ As can be seen from the uploaded papers, this trend puts into question the conventional approach to the principle of exhaustion. While conventional distribution leads to the change in the property rights and hence exhaustion, streaming relies on the right of making

²⁴⁴ Id.

²⁴⁵ Ficsor, supra note 8, at 515.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Cohen et al., supra note 2, at 430.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ WIPO, supra note 1, at 100.

available, according to which copyright owners retain full control over the accessibility of their works.²⁵² Thus, the changing nature of distribution raises important questions regarding the relationship between copyright and consumers.²⁵³

3.5 Technological Protection Measures (TPMs) and Digital Control

The rapid growth of digital technology has not only transformed the way copyrighted works are distributed but has also introduced new mechanisms for controlling access and use.²⁵⁴ One of the most significant developments highlighted in the uploaded documents is the use of Technological Protection Measures (TPMs), often referred to as Digital Rights Management (DRM).²⁵⁵ These technologies are used by copyright owners to control how digital content is accessed, copied, and shared. TPMs play a crucial role in the digital environment, but they also raise important legal and policy issues, particularly in relation to the doctrine of exhaustion.²⁵⁶ The traditional concept of exhaustion is based on the idea that control over a copy ends after the first sale, but TPMs allow copyright owners to maintain control even after distribution.²⁵⁷

3.5.1 Concept and Nature of Technological Protection Measures

TPM refers to technological protection measures, which are techniques meant to ensure that no one gains unauthorized access to or makes illegal copies of copyrighted materials.²⁵⁸ According to the documents that have been uploaded, TPM involves the incorporation of techniques like encryption, access controls, and restrictions of the utilization of copyrighted materials in the digital form.²⁵⁹ TPMs operate by controlling how the material can be utilized or accessed.²⁶⁰ As an illustration, TPM ensures that a particular file cannot be copied, shared, or stored on more than one device. These measures can be difficult to detect for most people but play an important role in determining how copyrighted materials will be used.²⁶¹ The utilization of TPMs indicates the need to protect copyrighted materials in a world characterized by rampant

²⁵² Ficsor, *supra* note 8, at 520.

²⁵³ *Id.*

²⁵⁴ World Intellectual Property Organization (WIPO), *World Intellectual Property Report 2019: The Geography of Innovation* 105 (2019).

²⁵⁵ Julie E. Cohen et al., *Copyright in a Global Information Economy* 450 (4th ed. 2015).

²⁵⁶ *Id.*

²⁵⁷ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

²⁵⁸ Mihály Ficsor, *The Law of Copyright and the Internet* 530 (2002).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

copying and sharing. At the same time, it highlights the need to protect the rights of copyright owners at the expense of consumers' privileges.

3.5.2 Legal Recognition of TPMs in International Framework

TPM systems are internationally recognized and protected under the international copyright law in accordance with WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).²⁶² In particular, this treaty requires member states to protect TPMs from any acts of circumvention. To put it differently, both the infringement of the copyright and acts of circumvention of TPM systems are illegal actions. The implementation of legal protection to TPM systems enhances the powers of control that copyright holders possess concerning their digital products. One may argue that legal protection to TPMs emerged because there was a necessity to adopt additional measures that would be able to enhance the existing measures of traditional copyright law with regards to protecting intellectual property rights in the digital age.

3.5.3 TPMs and the Shift from Legal to Technological Control

One of the most significant issues arising from the documents uploaded is the shift from legal control to technological control.²⁶³ Under the traditional system, the rights and obligations of copyright owners and users under copyright laws regulate copyrights and its usage. By contrast, TPMs empower copyright owners to implement restrictions on their work through technological means as opposed to legal means.²⁶⁴ There are many repercussions resulting from this issue. Firstly, while copyright laws have certain limitations and exceptions granted to copyright owners and users, TPMs can apply conditions that surpass copyright laws.²⁶⁵ For example, TPMs prevent the resale of copies of works despite the provisions of copyright laws allowing resale of works. In this case, TPMs supersede copyright restrictions. It is clear from the uploaded documents that this raises some issues on the rights of copyright owners and users.²⁶⁶

²⁶² WIPO Copyright Treaty arts. 11–12, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty arts. 18–19, Dec. 20, 1996, 2186 U.N.T.S. 203.

²⁶³ *Id.*

²⁶⁴ Julie E. Cohen et al., *supra* note 2, at 455.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

3.5.4 TPMs and Restriction on Transferability

Exhaustion doctrine is founded on the premise that once an item is sold, it should be free for transfer to another party.²⁶⁷ Yet, the use of TPMs makes it difficult to transfer copyrighted material. According to the materials uploaded in the lesson, digital products under TPMs cannot easily be resold, distributed or shared. For instance, the digital product may be restricted to a particular user or device, thus hindering their transfer to other individuals.²⁶⁸ This is despite the fact that such an individual has purchased the copyrighted content; yet, he/she cannot enjoy full ownership rights. Thus, TPMs violate the doctrine of exhaustion. Although legally speaking the distribution right is exhausted by the act of sale, technically it is difficult for the buyer to exercise his/her rights as per the exhaustion doctrine due to TPM restrictions.²⁶⁹

3.5.5 TPMs and Licensing Models

Furthermore, the uploaded documents indicate that TPMs are very close in nature to the licensing systems used for digital distribution of works.²⁷⁰ In view of the fact that digital works are licensed rather than sold, TPMs come into use with regard to the enforcement of the terms and conditions set forth in the license.²⁷¹ For instance, TPMs can be used to regulate whether the work is accessed according to the terms provided in the license, such as restrictions on copying, distributing, and also the period of access allowed by the copyright holder after distribution. The licensing system together with the use of TPMs results in a situation in which users are provided with less power than before.²⁷²

3.5.6 Impact on User Rights and Access

The employment of TPMs has major consequences for the protection of users' rights and accessibility of the material.²⁷³ The uploaded documents demonstrate that TPMs can impede lawful use of the copyrighted material, even the one that is considered legal by copyright law.²⁷⁴ This includes inability to create back-up copies of copyrighted material, inability to transfer it between devices, and inability to access it at all in certain periods of time. Such impediments

²⁶⁷ Goldstein & Hugenholtz, *International Copyright* 280 (3d ed. 2013).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Cohen et al., *supra* note 2, at 460.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Ficsor, *supra* note 5, at 540.

²⁷⁴ *Id.*

can reduce users' ability to fully enjoy their purchase.²⁷⁵ Moreover, TPMs can prevent users from accessing materials of a purely cultural or educational nature. Libraries and schools might face issues with accessibility of the material owing to technical limitations. Such an approach might pose a problem regarding the balance between copyright protection and the availability of information to the general public.

3.5.7 TPMs and the Prevention of Digital Exhaustion

Among the crucial problems raised in the uploaded documents concerns the ability of TPMs to prevent digital exhaustion.²⁷⁶ Despite any efforts to incorporate digital exhaustion into the law, TPMs may make the enforcement of such regulations difficult if not impossible. If, for instance, the use of DRM technology results in prohibition on copying and transferring of a particular digital file, the individual would be unable to sell the file even if it was legally possible.²⁷⁷ It follows that TPMs may inhibit the application of the exhaustion doctrine to the digital world. Indeed, this is regarded as one of the most crucial problems for copyright law.

3.5.8 Interaction Between TPMs and Reproduction Right

The relationship between TPMs and the right to reproduce. Due to the fact that digital transfers imply copying, TPMs are used to manage copying and prevent reproducing.²⁷⁸ Due to the limitation of copying, TPMs contribute to protecting the right to reproduce for copyright owners. At the same time, it is impossible to transfer digital products, as it implies reproducing. This creates additional problems when it comes to implementing exhaustion, as reproduction is involved in the process of digital transferring and TPMs limit reproduction.²⁷⁹

3.5.9 Legal and Policy Challenges

This prevalence of TPMs leads to significant legal and policy issues.²⁸⁰ The documents provided for upload reveal that there is an urgent need for balancing the interests of the copyright owner and the user. Firstly, the issue of preserving the applicability of exceptions

²⁷⁵ Id.

²⁷⁶ Perzanowski & Schultz, Digital Exhaustion, 58 UCLA L. Rev. 889, 930 (2011).

²⁷⁷ Id.

²⁷⁸ Ficsor, supra note 5, at 545.

²⁷⁹ Id.

²⁸⁰ Cohen et al., supra note 2, at 470.

and limitations to copyright laws is of great importance.²⁸¹ For instance, TPMs should not deny users their right to make fair use of copyrighted material or gain access to information. Secondly, the possibility that TPMs may result in the establishment of monopolies over digital works cannot be ruled out. This is due to the fact that TPMs allow copyright owners to maintain tight control over the market. The aforementioned points have brought up the debate regarding whether further regulations are required for ensuring appropriate TPM application.²⁸²

3.5.10 Future of TPMs in Digital Copyright Law

It is clear from the uploaded materials that TPMs are going to be an integral part of digital copyright law in the coming years. With changes in technology, additional protection and control measures may develop as well. Yet at the same time, more understanding of the challenges associated with TPMs may arise.²⁸³ There may be a need to update laws and regulations in order to protect the integrity of copyright law from technological advances. In any case, future developments in copyright law are expected to focus on maintaining the proper balance between technology and copyright.²⁸⁴

Technological protection measures have achieved a considerable position within the framework of digital copyright laws. As can be traced from the documents attached above, TPMs provide copyright holders with effective opportunities of managing their copyright objects in terms of their accessibility and utilization.²⁸⁵ On the one hand, TPMs play an important role in protecting copyrighted works against any illegal actions. On the other hand, TPMs cause problems within the domain of copyright exhaustion and users' rights, preventing the exchange and resale of digital content. The connection between TPMs, licensing models, and reproduction rights is the reflection of digital copyright legislation complexity. It must be kept in mind that further development of technologies necessitates updates of existing laws to preserve equilibrium.²⁸⁶ Thus, it can be concluded that TPMs provide copyright legislation with a considerable benefit and drawback at the same time.

²⁸¹ Id.

²⁸² Id.

²⁸³ WIPO, *supra* note 1, at 110.

²⁸⁴ Id.

²⁸⁵ Ficsor, *supra* note 5, at 550.

²⁸⁶ Id.

3.6 Legal Challenges and Emerging Issues in Digital Exhaustion

The emergence of digital technology has resulted in several difficulties being faced by the doctrine of exhaustion.²⁸⁷ It is evident from the uploaded documents that the doctrine, which was developed in order to regulate the distribution of tangible copies, faces numerous difficulties in the context of digital copies.²⁸⁸ Factors such as the transition from ownership to access, licensing, the reproduction right and TPMs have been important in contributing to the difficulty that exists in the area. This part will address the legal difficulties facing digital exhaustion.²⁸⁹

3.6.1 Breakdown of the Traditional Exhaustion Framework

The conventional theory of exhaustion rests on the assumption that when a copy of the work is legally sold, the control of the copyright holder over such a copy ceases.²⁹⁰ The rule proves useful when applied to tangible objects, as the transaction involves the change of ownership of the single copy from one party to another without reproduction of the object.²⁹¹ Nevertheless, as indicated in the uploaded materials, this approach is irrelevant in the online space. In the digital realm, there is no transfer of any tangible object, only data transmission, which usually requires reproduction of the material.²⁹² The basic prerequisites for applying exhaustion are thus absent. The lack of an evident transfer of ownership adds complexity to the problem. In most cases, digital transactions are presented as licenses, not sales, and therefore, the issue of exhaustion becomes irrelevant.²⁹³

3.6.2 Conflict Between Distribution and Reproduction Rights

One of the major legal issues discussed in the provided materials is the issue arising out of the opposition of the distribution right to the reproduction right.²⁹⁴ Exhaustion applies only to the distribution right but does not apply to the reproduction right, which is often associated with digital transactions.²⁹⁵ The fact of transferring a digital file entails creation of a duplicate copy

²⁸⁷ World Intellectual Property Organization (WIPO), World Intellectual Property Report 2019: The Geography of Innovation 115 (2019).

²⁸⁸ Mihály Ficsor, *The Law of Copyright and the Internet* 560 (2002).

²⁸⁹ Julie E. Cohen et al., *Copyright in a Global Information Economy* 480 (4th ed. 2015).

²⁹⁰ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

²⁹¹ Goldstein & Hugenholtz, *International Copyright* 285 (3d ed. 2013).

²⁹² Ficsor, *supra* note 2, at 565.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

of this file on the other party's device. Consequently, distribution cannot be separated from reproduction. Since reproduction is not governed by exhaustion, copyright holders are able to use this right in the process of restricting the digital transfer. The issue described above makes impossible the practical application of the exhaustion principle to digital transactions. Although the distribution right may become exhausted, there will always be another possibility for regulating these transactions.²⁹⁶

3.6.3 Licensing Models and Contractual Restrictions

As per the provided files, the distribution of digital material mostly occurs by using the concept of licensing instead of selling.²⁹⁷ Users are provided with a certain degree of freedom to utilize the information, but it doesn't give them any kind of ownership.²⁹⁸ There may be clauses regarding no transfer, copying, and sharing in the licensing agreement. In cases where the exhaustion principle permits resale or transfer, the license agreement prevents the users from doing so. Licensing leads to the application of contract law instead of copyright law. It gives copyright holders the liberty to apply some restrictions that cannot be imposed within the ambit of copyright law.²⁹⁹

3.6.4 Role of Technological Protection Measures

TPMs serve an essential purpose in the enforcement of restrictions placed on digital works. According to the uploaded documents, TPMs have the ability to prohibit any form of copying, dissemination, or distribution of digital works.³⁰⁰ TPMs may be employed by copyright owners in order to nullify any possible application of the exhaustion rule. In other words, even if the exhaustion concept exists under law, TPMs will render it useless. It is worth noting that TPMs are combined with laws which prohibit TPM circumvention.³⁰¹

3.6.5 Judicial Uncertainty and Divergent Approaches

As seen from the attached legal materials, the courts are inconsistent when addressing the question of digital exhaustion.³⁰² On the one hand, there were instances where courts have

²⁹⁶ Id.

²⁹⁷ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).

²⁹⁸ Id.

²⁹⁹ Cohen et al., supra note 3, at 485.

³⁰⁰ WIPO Copyright Treaty arts. 11–12, Dec. 20, 1996, 2186 U.N.T.S. 121.

³⁰¹ Perzanowski & Schultz, Digital Exhaustion, 58 UCLA L. Rev. 889, 935 (2011).

³⁰² Id.

refused to apply the First Sale Doctrine, as it would be more appropriate to invoke the reproduction right. On the other hand, there have been attempts to apply the doctrine to digital copies in certain situations.³⁰³ So, for example, in the case of downloading software, exhaustion was allowed, while in the case of selling digitalized copies of songs on the Internet, it was prohibited. This approach causes inconsistencies within the legal framework because, at present, there is no clear criterion when to apply exhaustion in the case of digital copies.³⁰⁴

3.6.6 Absence of Clear International Standards

It is evident from the uploaded documents that international copyright laws have not provided any definite way regarding the application of exhaustion principle in digital media. As per the provisions of the Berne Convention, TRIPS Agreement, and WIPO treaties, each country can decide whether to implement the exhaustion doctrine³⁰⁵. Although, under WIPO treaties, exhaustion can only be applicable to physical forms and the making available right is acknowledged, but no such specific guidelines have been framed in this regard. As a result, disparities may arise in different jurisdictions, and cross-border digital transactions become difficult.³⁰⁶

3.6.7 Impact on Secondary Markets and Consumer Rights

There are important implications for the effects of digital exhaustion regarding the secondary market and consumer rights.³⁰⁷ According to the documents that were uploaded, without exhaustion, digital products cannot be resold and transferred. Secondary markets therefore cannot be developed for digital items because the same can happen in the offline world. The failure to develop such a secondary market means that consumers do not benefit from the resale of what they buy. Another issue arising in this regard is the expectation created by consumers about the use of digital content. Consumers expect that by paying for digital content, they will obtain the right of ownership like any physical item.³⁰⁸

³⁰³ Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018).

³⁰⁴ Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., 2012 E.C.R.

³⁰⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886; TRIPS Agreement, Apr. 15, 1994; WIPO Copyright Treaty, Dec. 20, 1996.

³⁰⁶ TRIPS Agreement art. 6.

³⁰⁷ Perzanowski & Schultz, *supra* note 15, at 940.

³⁰⁸ *Id.*

3.6.8 Economic Implications for Copyright Owners and Users

The move away from exhaustion within the digital medium has important economic ramifications for copyright owners and consumers. From the documents that were uploaded, it can be concluded that through licenses and digital control, copyright owners can make money continuously.³⁰⁹ This means that copyright owners need not depend on selling items once and can engage in different methods of making money, including subscription-based payments. This method will enable them to enjoy economic stability. Nonetheless, this strategy may not enhance consumer welfare since they do not have full freedom to use or transfer digital products. This approach raises their expenses while limiting their access to such products.³¹⁰ Moreover, the lack of secondary markets makes the overall market less efficient. Physical items can be sold again within the real world but cannot be done within the digital medium.

3.6.9 Tension Between Access and Control

One of the key problems that emerge from the above-mentioned documents is that of access versus control.³¹¹ Digital technologies have opened up numerous opportunities for content accessibility and sharing, but copyright laws and technologies have made control easier. This problem can be seen as a part of the larger problem of conflicting interests of the copyright holders on one side and those of users on another. In the former case, people want their products protected and their profit ensured, while in the latter, users desire access to content. The exhaustion doctrine usually ensured a certain balance between these competing interests, but not anymore in the digital age.³¹²

3.6.10 Emerging Debates and Future Directions

The problems of digital exhaustion have sparked discussions regarding the future of copyright laws. Based on the uploaded papers, the idea is that it is necessary to review the principles of applying certain laws in the digital context.³¹³ There are people who believe that the principle of exhaustion should be extended to include digital works, while others claim the necessity of protecting the reproduction right in order to prevent any piracy. In addition, it is possible to

³⁰⁹ WIPO, *supra* note 1, at 120.

³¹⁰ Cohen et al., *supra* note 3, at 490.

³¹¹ Ficsor, *supra* note 2, at 580.

³¹² *Id.*

³¹³ Perzanowski & Schultz, *supra* note 15, at 950.

develop completely new approaches to copyright based on the peculiarities of digital technologies. In order to see which direction the principle of exhaustion will take in the future, it is necessary to balance all these interests.³¹⁴

The application of the doctrine of exhaustion in the digital era poses many legal issues. In the uploaded files, it is evident that the existing traditional doctrine of exhaustion is one that applies in regard to tangible copies being distributed; thus, it cannot be used without difficulties in regard to the digital era. It should be considered that there are several aspects related to issues associated with the reproduction right, license agreements, technological protection measures, and the lack of international standards that make it difficult to implement exhaustion in digital copies.³¹⁵ On the other hand, there are several implications for consumer rights and the functioning of markets because of the impossibility of implementing the doctrine of exhaustion in the digital world. Therefore, the problem of digital access vs. control becomes important in the discussion of copyright laws.³¹⁶

³¹⁴ Id.

³¹⁵ WIPO, *supra* note 1, at 125.

³¹⁶ Ficsor, *supra* note 2, at 585.

CHAPTER – 4

Chapter 4: Legal Position of Copyright Exhaustion in India

4.1 Statutory Framework of Copyright Exhaustion in India

4.1.1 Introduction to the Statutory Basis of Exhaustion in India

Statutory definition of exhaustion of copyright in India is found in the provisions contained in the Copyright Act, 1957.³¹⁷ Contrary to jurisdictions which have expressly defined and enshrined exhaustion of copyright as a doctrine, in India, the concept of exhaustion is indirectly addressed under the Copyright Act. The statutory provisions on bundle of rights enjoyed by copyright owners form the backbone of exhaustion of copyright.³¹⁸ Works protected under the Copyright Act, 1957 in India include literary, musical and artistic works, cinematograph films, sound recordings, and computer programs.³¹⁹ Works are not only tangible but also intangible and therefore, a distinction can be made between the intangible work and its tangible copy, as far as copyright exhaustion is concerned. Exhaustion of copyright is essentially a restriction on copyright. Exhaustion restricts the bundle of rights of copyright owners in relation to particular copies sold to the public. As opposed to the copyright, which subsists for many years; in case of the intangible work, i.e., copyright, the rights of the owner expire once a particular copy is sold

4.1.2 Section 14 and the Bundle of Rights

The relevant statutory provision regarding copyright exhaustion in India is the Section 14 of the Copyright Act, 1957. This statutory provision states that copyright includes exclusive rights of authorship which are available to copyright owners, and the specific provisions include reproduction, distribution, issuing copies and communicating the work to the public. One of such exclusive rights of the copyright owner is "to issue copies of the work to the public not being copies already in circulation." This statutory wording is what the doctrine of exhaustion relies upon in Indian case-law. Further, as per the explanation attached to Section 14, once the copy of work has been sold by the copyright owner, the copy becomes "already in circulation." Thus, from these statutory formulations it can be concluded that a copyright owner cannot further distribute the particular copy after its lawful sale because once the copy was sold, the

³¹⁷ Copyright Act, 1957 (India).

³¹⁸ Shannad Basheer, *Parallel Imports and Indian Copyright Law*, 3 J. Intell. Prop. L. & Prac. 100, 102 (2008).

³¹⁹ Copyright Act, 1957, 13 (India).

exclusive distribution right is exhausted for this copy. It should be noted, however, that depending on the category of the work at hand, the principle of exhaustion may not be applied in the same manner

4.1.3 Differential Treatment of Various Categories of Works

It may be noted that one of the distinguishing features of the statutory regime is the treatment of various works differently under Section 14 as far as exhaustion is concerned. In respect of literary, dramatic, musical and artistic works, the copyright owner enjoys the exclusive right of issuing copies provided that such copies have not been issued previously. As can be noticed here, the concept of exhaustion has been expressly incorporated into Section 14. The moment a copy is sold by the copyright owner, his control over the same comes to an end. On the other hand, it is a different matter when the copyright holder sells or rents cinematographic films or sound recordings as Section 14(d)(ii) and 14(e)(ii) provide that the copyright owner shall have exclusive right to sell or give on hire cinematographic films or sound recordings regardless of whether such copy has been sold or given on hire on earlier occasions. This implies that the principle of exhaustion will not apply fully in respect of cinematograph films or sound recording. It must be pointed out that there is also another statutory exception to the doctrine of exhaustion with regard to computer programs.

4.1.4 Section 51 and the Concept of Infringement

An essential piece of legislation that bears significance for the question of exhaustion of rights is Section 51 of the Copyright Act that defines infringement of copyright.³²⁰ As stated in this legislation, copyright infringement is the execution of an act by someone that is exclusive in nature to the copyright holder alone. Sub-section (b)(iv) is focused on importation of copies that are infringing in nature.³²¹ This sub-section provides that importation of such copies constitutes infringement except under certain situations where imports are made for personal purposes. However, what has not been defined by the Copyright Act is whether imports made for other reasons would constitute infringement. Section 14 of the Copyright Act confers an exclusive right to reproduce and sell, but no such right is conferred with respect to the issue of importation of the work.

³²⁰ Copyright (Amendment) Act, 1994 (India).

³²¹

4.1.5 Territorial Scope of Exhaustion under Indian Law

One of the most controversial aspects in the statute is the territorial extent of exhaustion. The Copyright Act makes no express provision as to whether the exhaustion is national or international. There can be three ways of interpreting the statutory provisions on exhaustion. One way of understanding the exhaustion under the Copyright Act would be that it is national or territorial, implying that exhaustion occurs only in India. The second way would be that exhaustion applies only to particular territories decided by the copyright owner. Another interpretation could be that exhaustion under the Act is international, implying that when a copy of work is distributed anywhere in the world, exhaustion occurs internationally. The statutory provision provides no clarity on this aspect. Courts have, however, tended to interpret this aspect in favor of national or territorial exhaustion due to the relevance of territorial licensing systems. On the other hand, some jurists believe that the lack of any restriction on the exporter of works combined with Section 14 indicates the application of international exhaustion principle.

4.1.6 Impact of the 1994 Amendment

It can be argued that one of the significant milestones for the law in this regard came in 1994 when a new provision was introduced into the Copyright Act. Prior to this modification, the law mentioned the right to “publish” works. With the new amendment, it was modified to refer to the right to “issue copies of the work to the public not being copies already in circulation.” What made this amendment significant was the fact that this helped India move closer to embracing the doctrine of exhaustion. With the inclusion of such language, it meant that after a certain copy was issued, its further exploitation by the copyright holder would be difficult. The amendment, however, did not clarify anything regarding the territorial application of the concept.

4.1.7 Judicial Interpretation of the Statutory Framework

Several Indian cases have been decided upon the interpretation of statutory provisions regarding exhaustion. These decisions have played an important role in shaping the law. One of the earliest and significant decisions of India regarding copyright exhaustion is **Penguin Books Ltd. v. India Book Distributors (1985)**.³²² It is a landmark case cited in almost all

³²² Penguin Books Ltd. v. India Book Distributors, A.I.R. 1985 Del. 29

copyright exhaustion cases. It is often criticized for the incorrect interpretation of the copyright exhaustion laws of India. The facts of the case were about the importation and subsequent sale of books in India without obtaining any prior consent from the copyright owner or its exclusive licensee. In the present case, Penguin Books had exclusive rights over a number of books and contended that importing and selling such books without their permission was an act of infringement of copyright. On the other hand, the defendant alleged that as soon as such books were legally imported abroad, there would be no restriction left on their further sale in any other part of the world. In its judgment, the High Court of Delhi had to decide whether the importation of copyrighted works that were legally created abroad into India without the permission of the copyright holder would constitute an infringement of the copyright as per the provisions of the Copyright Act, 1957. It was specifically incumbent upon the High Court to define the scope of the rights conferred by Section 14 of the Act. Penguin Books won the case, and the High Court of Delhi held that the importation of the copyrighted works without any permission from the copyright holder was indeed an act of copyright infringement. The basis for the decision taken by the High Court lay in a generous interpretation of the rights of the copyright holder. At that point in time, Section 14 provided the copyright holder with the exclusive right “to publish” the work. Moreover, the Court extended its reasoning by determining that importation can also be regarded as one of the integral elements of publication. The Court stated that importation of books into India with the intention of selling those books is directly associated with the act of making copies available to the public. Thus, it was implied that the exclusive right of publishing also entailed the exclusive right of controlling importation. As a consequence, all acts of importation carried out without authorization of the copyright holder or licensee were deemed to be an infringement of copyright. This legal position enabled copyright owners to have an influence on both the first distribution of copies and their further circulation among other countries. That is, even if books were legitimately distributed and sold in foreign countries, the process of importing such books into India could be controlled by copyright holders. Nonetheless, this ruling received considerable backlash not only in the legal literature but also during subsequent legal scrutiny. For one, the ruling allowed the Court to extend the coverage of copyright beyond what is expressly indicated by the statute. Specifically, section 14 of the Copyright Act did not mention a right to control importation. On the contrary, this provision concerned the copyright holder’s rights concerning the reproduction, publication, and distribution of his works. In essence, the Court broadened the concept of “publication” to encompass importation, thus granting the holder an additional right that had no clear statutory basis. In addition, critics argued that the ruling ignored the important

principle of exhaustion. Under the exhaustion theory, otherwise known as the first-sale doctrine, the copyright owner loses all right to regulate how the copy of the work is disposed of after it is sold. In other words, once the copy has been sold, its sale or distribution does not need any authorization from the copyright owner. In the case of Penguin, no detailed consideration was done by the Court regarding the application of this principle. The court concentrated more on the rights of the copyright holder without considering the rights of the buyer, thereby leading to a biased decision that favoured the copyright holder while curtailing the free movement of products. Moreover, the lack of consideration of the principle of exhaustion created issues related to property rights. For instance, when someone buys a book, the buyer becomes the legal owner of that particular product. Based on the common law of property, the owner can sell or dispose of the property at will. However, the ruling by the Court compromised this doctrine by making the copyright holder have powers over the disposal and importation of products.

This aspect becomes even more complicated in consideration of the privity of contract doctrine. Restrictions may be applied by the copyright owners in accordance with contractual arrangements between the owner and a distributor or licensee. Such restrictions must not be applicable to parties not related to the transaction. In the Penguin case, the court implicitly allowed such restrictions to be applied to third parties who have no connection to the agreement. It should also be noted that the decision introduced uncertainty into the law. The expansion of copyright protection that was undertaken by the court did not correspond to the statutory language of the act. In addition, it discouraged parallel imports. The ruling ignored the impact on the economy that arises from prohibiting parallel imports. Importation of cheaply produced books in other nations restricts consumer access and increases their cost, which might pose problems in a country such as India where affordability of publications is important. The weaknesses of the ruling have been exposed following the introduction of amendments in 1994 to the Copyright Act, wherein the right to "publish" was replaced by the right "to issue copies of the work to the public not being copies already in circulation." This has an effect on the doctrine of exhaustion, since once the copy is sold it enters into circulation. The majority of commentators believe that this amendment was meant to fix the overly expansive construction that was held in the Penguin case. In essence, the copyright owner's exclusive right only extends to the first sale of copies. Even though there was an amendment made, the ruling in the Penguin case still played a significant role in other decisions, such as Eurokids International v. India Book Distributors. This was achieved through similar reasoning and without taking into

consideration the effect of the amendment, thus creating even more confusion regarding the legal status. To conclude, the Penguin Books case stands out as an essential yet highly contested ruling in Indian copyright law. However, even as it offered significant protection to the copyright holders, it did so by increasing their exclusive rights far more than what was set out in the statute.

Another relevant landmark judgment in Indian copyright law is the case of **Eurokids International Pvt. Ltd. v. India Book Distributors (2005)**,³²³ wherein the doctrine of exhaustion and parallel imports were considered. This decision has also been rendered by the Bombay High Court, which in most parts adhered to the same line of reasoning as the earlier case of *Penguin Books Ltd. v. India Book Distributors (1985)*. In this case, as in the previous one, there were issues related to books being imported and sold without the permission of the copyright holder or his exclusive licensee. Rather than analyzing the principle of exhaustion itself, the High Court of Bombay gave more weight to the judgment in the Penguin case. The Court accepted the premise that the exclusive rights granted to the copyright holder were not only related to the creation and sale of books but also covered importation and distribution within the country. For this reason, it ruled that the unauthorized importation of books could constitute infringement. One of the main problems with this decision is that the Court neglected to analyze the applicable statutes, particularly Section 14 of the Copyright Act. It merely mentioned Section 14 to define what copyright is. Most importantly, the Court failed to take into account the import of the 1994 amendment to the Copyright Act. According to this amendment, the right to issue copies of the work to the public “not being copies already in circulation” took the place of the previous right to “publish”. This is of great importance, as it directly follows from the theory of exhaustion that once a copy has been sold, it must be considered as being “already in circulation”, and its copyright protection ought to be over. But the Court of Appeal in the case of Eurokids chose to ignore this new legislative trend and adhered to the older line of reasoning, which had been established by the earlier ruling in the case of Penguin. It can thus be said that the judgement was severely criticized due to lack of proper reasoning. It failed to address the theory of exhaustion, nor did it properly consider how the wording of the statutory provision could be used in order to protect lawful sales of copies. However, later judicial opinion and legal interpretation would argue that the amendment of 1994 gives an ample scope for applying the principle of exhaustion in a wider sense. As per

³²³ Eurokids Int'l Pvt. Ltd. v. India Book Distribs., 2005 (31) PTC 145 (Bom).

the interpretation, when a copy is sold lawfully in any jurisdiction, it shall be deemed to be 'in circulation', and the copyright holder shall not be permitted to exercise control over its subsequent distribution. This interpretation favours the concept of international exhaustion and facilitates the practice of importing genuine copies of copyrighted works from overseas countries into India. Such an explanation reveals that the reason for the use of the exhaustion doctrine has everything to do with striking a balance between protection of copyrights on one side and free trade and consumer benefits on the other side. On a final note, although Eurokids' case follows the same restrictive interpretation of the copyright statute as seen in the Penguin case, it attracts criticism because it neglects changes made to the statute and the principle of exhaustion of copyrights.

It is important to note that the judgment in **Warner Bros. Entertainment Inc. v. Santosh V.G. (2009)**³²⁴ marks a significant step in the evolution of the doctrine of exhaustion of copyright in India, specifically as it pertains to cinematograph films. In contrast to other decisions on copyright, such as Penguin and Eurokids, where the question of applying the exhaustion doctrine did not arise at all, in this case, the doctrine itself was expressly taken into account by the court. The subject of the dispute between the plaintiff and the defendant was the importation and rental of copies of cinematograph films in India without the copyright holder's permission. The defendant contended that since he had imported lawfully sold DVDs of cinematograph films from abroad, then the copyright holder's right regarding these DVDs is exhausted, and thus the importation and rental thereof is legal. In turn, the plaintiff relied on specific statutory provisions concerning films. At any rate, the Court agreed that there existed a doctrine of exhaustion and briefly expounded upon its meaning. Specifically, once a copy of the copyrighted work was sold lawfully, its further transfer could not be controlled by the copyright holder.

However, the Court proceeded to consider the applicability of this doctrine in relation to the cinematograph films in India. It did so in light of the relevant provisions of Section 14(d)(ii) of the Copyright Act, 1957. According to these provisions, the copyright owner is entitled to the exclusive right to sell or hire out, or to offer for sale or hire any copy of the film irrespective of the fact that the copy had been sold or hired previously. In light of the above provisions, the

³²⁴ Warner Bros. Entm't Inc. v. Santosh V.G., 2009 (39) PTC 449 (Del).

Court held that the doctrine of exhaustion is not fully applicable to cinematograph films. Even with this initial transaction, the copyright owner still enjoys rights concerning renting and distribution of the film. This is due to the fact that such rights have been protected through legislation, hence making it an exception to the doctrine of exhaustion. The Court, therefore, found that the importation and rental of the films without authority was infringement of copyrights. The Court's application of the doctrine of exhaustion of copyrights is, however, controversial. For starters, some have argued that the Court made an incorrect application of the doctrine by labeling the imported DVDs as infringements despite the fact that they had been legitimately manufactured and distributed. The second issue is the confusion created in distinguishing between transferring the DVD copy and reproducing copyrighted material. From the discussion above, it is clear that the current case provides an example of the contradictory application of the doctrine of exhaustion of copyrights within the Indian legal system. On one hand, instances like the Penguin Books and Eurokids cases ignored the doctrine altogether, while on the other hand, the Warner Bros case upheld it. Furthermore, the case is a prime example of how difficult it is to implement the statutory provision. There is a different way in which the various works under the Copyright Act are interpreted, hence giving rise to different results. Exhaustion can be applied with more certainty in literary works but it is limited when it comes to films and software. From all this, it is safe to conclude that the case at hand highlights the progress as well as the difficulties in Indian copyright law. The fact that the concept of exhaustion was recognized in this particular case is positive, however the statutory provisions greatly undermine it.

4.1.8 Copyright Exhaustion in Software and Digital Context

Things get even more complicated when talking about computer programs.³²⁵ Under the copyright law, computer programs fall under literary works. Yet, computer programs have their own specific rights apart from literary works, like the right to rent. Certain actions, for example, making copies for personal purposes or interoperability, are explicitly exempted from the definition of copyright infringement in the Act. But exhaustion in relation to digital copies is not entirely clear. Digital copies are normally distributed via licensing agreements, rather than sales.³²⁶

³²⁵ Copyright Act, 1957, 2(o) (India).

³²⁶ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).

4.1.9 Balancing Copyright and Property Rights

Exhaustion is considered a compromise between copyright law and property law. According to copyright law, exclusive rights belong to the original creator of the piece.³²⁷ On the other hand, according to property law, the owner of the copy can make use of and disseminate that piece. The legislation is balanced in such a way that there is an exception made for distribution post-first sale but also keeps room for exceptions such as rental contracts and exclusions based on particular genres. In this way, copyright does not become a permanent restriction on the property. It also protects the financial benefit of copyright owners.³²⁸

Copyright exhaustion in India suffers from fragmentation in the statutory provisions applicable to it. While there is no clear definition for copyright exhaustion in India, it is determined from various provisions under Section 14 and Section 51 of the Copyright Act, 1957.³²⁹ The principle of copyright exhaustion applies to certain situations, such as literary and artistic works; however, it is limited to certain other works, including films, sound recordings, and computer programs. Further, the confusion about its territorial application, including the applicability to copies stored digitally, adds to the confusion regarding the principle of copyright exhaustion. There have been varied judgments on copyright exhaustion in India; thus, understanding the principle of copyright exhaustion becomes even more difficult. Nevertheless, there have been certain amendments that make the principle clear, though not without gaps.³³⁰

4.2 Recognition of the First Sale Doctrine in Indian Law

4.2.1 Introduction to the First Sale Doctrine in India

There is no specific provision in the copyright law of India that addresses the "First Sale Doctrine."³³¹ Rather, the doctrine finds its application indirectly through legislation and courts. The First Sale Doctrine operates as an exception to the rights of reproduction and distribution conferred upon the author of the work, whereby after the lawful sale of the copy to another person, the rights holder loses all control over further disposition of that copy.³³² In terms of

³²⁷ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³²⁸ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³²⁹ Basheer, *supra* note 2, at 110.

³³⁰ *Id.*

³³¹ Copyright Act, 1957 (India).

³³² Shamnad Basheer, *Parallel Imports and Indian Copyright Law*, 3 *J. Intell. Prop. L. & Prac.* 100, 103 (2008).

the copyright law of India, the doctrine has been formulated through judicial decisions as well as legislative interpretation. Even though the Copyright Act, 1957 does not specifically make any reference to the First Sale Doctrine, it cannot be denied that certain features of exhaustion are found in the wording of the Act under Section 14.³³³

4.2.2 Statutory Recognition through Section 14 of the Copyright Act

The major statutory foundation behind the application of the First Sale Doctrine in India can be found in Section 14 of the Copyright Act, 1957.³³⁴ This section provides an enumeration of the rights that belong to a copyright owner, which includes the right to issue copies of the copyrighted work to the public. One of the essential features of Section 14 is the expression “not being copied already in circulation.” Such language suggests that if a particular copy has already been sold lawfully, then such a copy will become part of the circulation and the copyright holder shall have no further control over its further distribution.³³⁵ The official explanation to Section 14 of the Copyright Act also states that if a copy of the work has already been sold once, it becomes a copy already in circulation. It is clear from the above discussion that the definition of the First Sale Doctrine can be found in Section 14 of the Copyright Act, 1957.³³⁶ The recognition of the doctrine through Section 14 is therefore indirect and conditional. It applies clearly to certain categories of works, such as literary and artistic works, but is restricted or modified for others, such as films, sound recordings, and computer programs.

4.2.3 Conceptual Basis of the Doctrine in Indian Law

"The Indian version of the first sale doctrine is based on the necessity of harmonizing copyright legislation and the requirements of property legislation."³³⁷ If an individual buys a material embodiment of a copyrighted work (e.g., books or CDs), the buyer acquires full ownership of this embodiment. This right of property implies freedom to use, sell or otherwise dispose of that embodiment. Exhaustion makes sure that copyright law does not limit these freedoms.³³⁸ The copyright holder receives his/her payback during the very first sale, and further

³³³ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³³⁴ Copyright Act, 1957, § 14 (India).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 37 (2003).

³³⁸ *Id.*

transactions will not be his/her concern anymore. Exhaustion can thus help ensure efficiency of the markets, because otherwise every transfer would require the copyright holder's consent. In addition, exhaustion does not remove all rights of the copyright holder at once; it exhausts merely the distribution right, not reproduction or communication to the public, for example.³³⁹

4.2.4 Judicial Recognition of the First Sale Doctrine

The evolution of the doctrine of first sale in India is largely because of judicial interpretation of law.³⁴⁰ The courts have played an important role in interpreting the law and in delimiting the scope of law in relation to the doctrine of exhaustion. In the case of Penguin Books Ltd. v. India Book Distributors (1985),³⁴¹ a narrow view was adopted wherein it was held that importation without authorization constituted an infringement. The expansive view of the copyright owners' right was taken whereby the right to import was also included within the ambit of copyright owners' right. This was also the case of Eurokids International Pvt. Ltd. v. India Book Distributors (2005),³⁴² where another narrow view was adopted by the Bombay High Court. In this case, the Bombay High Court ignored the effect of the amendment brought about in the Copyright Act in 1994. Such a better understanding of the doctrine is evident in the case of Warner Bros. v. Santosh V.G. (2009),³⁴³ where the Delhi High Court recognised the doctrine of exhaustion and highlighted the importance of the same. But it has been made clear by the court that the doctrine of exhaustion will not have the same effect on cinematograph films. It is thus evident from the above-discussed cases that while the Indian courts are cognizant of the doctrine, they have failed to apply it uniformly.

4.2.5 Impact of the 1994 Amendment on Recognition of the Doctrine

The amendments made in the Copyright Act in 1994 were very crucial in ensuring that the concept of First Sale Doctrine gained popularity in India.³⁴⁴ The use of phrases such as the right to "issue copies of the work to the public not being copies already in circulation" rather than the right to "publish" is indicative of an intention to deprive the copyright owner of any control after the first sale. The amendments have ensured that India came closer to incorporating the

³³⁹ Id.

³⁴⁰ Basheer, *supra* note 2, at 105.

³⁴¹ Penguin Books Ltd. v. India Book Distributors, A.I.R. 1985 Del. 29.

³⁴² Eurokids Int'l Pvt. Ltd. v. India Book Distributors, 2005 (31) PTC 145 (Bom).

³⁴³ Warner Bros. Entm't Inc. v. Santosh V.G., 2009 (39) PTC 449 (Del).

³⁴⁴ Copyright (Amendment) Act, 1994 (India).

concepts of exhaustion and First Sale Doctrine. It is unfortunate that the amendment does not indicate the geographical extent of exhaustion or any provisions related to importations or distribution through electronic means.³⁴⁵

4.2.6 Recognition of Exhaustion in Relation to Parallel Importation

The other problem associated with the applicability of the First Sale Doctrine in India relates to its impact on parallel imports.³⁴⁶ According to the statutory provision, parallel imports are defined as the importation of original copies of copyrighted materials from other countries without the permission of the copyright holder. The provisions of the statute do not clearly clarify the legality of these imports.³⁴⁷ Section 51 of the Act bars the importation of any infringing copy; however, there is no discussion of the importation of any legally manufactured copy. In this regard, judicial interpretation has followed a conservative path by declaring parallel imports as acts of infringement of the right.³⁴⁸ This decision has been widely criticized on the ground that it does not take into account the doctrine of exhaustion. Legal interpretations by scholars indicate that Indian law may be more favorable towards international exhaustion and allow for parallel imports.

4.2.7 Differential Application Across Categories of Works

There is no consistent implementation of the First Sale Doctrine with regard to the various forms of copyrighted works. The legislative regime establishes different regimes for different types of copyrighted works.³⁴⁹ With respect to literary and artistic works, the First Sale Doctrine is explicitly recognized by means of the copies that have been "already in circulation." Once a book has been sold, the purchaser may resell the same without violating any copyright laws.³⁵⁰ On the other hand, with respect to cinematograph films and sound recordings, the copyright owners are allowed to control their resale and rental even after the initial sale. Hence, there is less room for applying exhaustion principles. The same holds true with respect to

³⁴⁵ Id.

³⁴⁶ Basheer, *supra* note 2, at 106.

³⁴⁷ Copyright Act, 1957, § 51(b)(iv) (India).

³⁴⁸ *Penguin Books Ltd., A.I.R.* 1985 Del. 29.

³⁴⁹ Copyright Act, 1957, § 14(a)–(e) (India).

³⁵⁰ Id.

computer programs wherein the introduction of the right of rental hinders the functioning of the doctrine.

4.2.8 Challenges in Recognising the Doctrine in the Digital Environment

The identification of the First Sale Doctrine becomes increasingly difficult when it comes to digital items.³⁵¹ When digital products are distributed via licensing, exhaustion cannot be applied effectively. This is because the customer does not obtain ownership rights to the item, as he/she would when buying an item from a store. Reproduction, on the other hand, is not included in the doctrine of exhaustion.³⁵² Therefore, since licensing and reproduction are two key concepts in digital transactions, the First Sale Doctrine cannot be recognized in the digital world. There is no provision for this problem in the statute itself.

4.2.9 Balancing Copyright Protection and Consumer Rights

First Sale Doctrine is an attempt at balancing copyright holders' interests and those of consumers. Firstly, the copyright statute attempts to ensure the economic benefits of authors are protected.³⁵³ Secondly, buyers want to own copies of work purchased by them. Exhaustion prevents copyright from being a perpetual restriction on usage and sale of property. It allows the promotion of free trade and facilitates access to information. Limitations on the doctrine such as restrictions in respect of some categories of work and due to license agreement, among others, might impact the equilibrium.³⁵⁴ The issue before Indian law will be to strike a proper balance between the two ends of the spectrum.

First of all, the presence of the First Sale Doctrine in India is admitted by law. For instance, the Copyright Act under Section 14 admits the exhaustion of copyrights, but it should be pointed out that the application of the concept may differ from one work to another.³⁵⁵ The judicial rulings also admit the doctrine of the first sale although in a different interpretation. It means such cases as Penguin Books, Eurokids, and Warner Bros. However, there is no question that the amendment in 1994 strengthened the acknowledgement of the doctrine but numerous questions remain unanswered. Among them, one should point out the territorial issue of the

³⁵¹ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

³⁵² *Id.*

³⁵³ Landes & Posner, *supra* note 7, at 40.

³⁵⁴ *Id.*

³⁵⁵ Basheer, *supra* note 2, at 110.

first sale doctrine and how it applies to digital technology. The admission of the First Sale Doctrine shows the ongoing efforts made by India to improve legislation and protect consumers' rights.³⁵⁶

4.3 Judicial Interpretation of Copyright Exhaustion in India

4.3.1 Introduction to Judicial Interpretation of Exhaustion

In India, the concept of copyright exhaustion has been more judicially interpreted than expressly provided for by statute.³⁵⁷ Although the provisions in the Copyright Act, 1957, especially Section 14, provide some hints regarding copyright exhaustion, the concept is not expressly defined.³⁵⁸ The role of judicial interpretation in India has been crucial in establishing the scope, application, and limitations of copyright exhaustion.³⁵⁹ However, judicial interpretation has not been consistent in India. Various courts have employed different perspectives on copyright exhaustion at different times. There have been instances where the courts have applied a conservative approach and granted broader rights to copyright owners, whereas there have been others where there has been an inclination towards copyright exhaustion.³⁶⁰

4.3.2 Early Judicial Approach: Restrictive Interpretation

The first precedent decision regarding exhaustion in India was *Penguin Books Ltd. v. India Book Distributors* (1985),³⁶¹ wherein the dawn of judicial intervention into the concept of parallel imports and the extent of copyright protection was seen. The Delhi High Court adopted a conservative position in this case. Under this position, importing books into India without the authorization of the copyright owner constitutes an infringement of the copyright. Importing was considered part of the act of publishing.³⁶² By doing so, the Delhi High Court virtually made it impossible for the exhaustion principle to apply to international transactions. Even though the copies of books were manufactured lawfully and then exported to other countries, importing them would be considered a breach of copyright. One important problem related

³⁵⁶ Id.

³⁵⁷ Copyright Act, 1957 (India).

³⁵⁸ Id.

³⁵⁹ Shamnad Basheer, *Parallel Imports and Indian Copyright Law*, 3 J. Intell. Prop. L. & Prac. 100, 108 (2008).

³⁶⁰ Id.

³⁶¹ *Penguin Books Ltd. v. India Book Distribs.*, A.I.R. 1985 Del. 29.

³⁶² Id.

to this case is that the principle of exhaustion was completely ignored by the court. Rather than achieving a balance between the interests of the copyright owner and those of the purchaser, the Court concentrated more on safeguarding the interests of the copyright owner. Therefore, copyright had exceeded its scope as defined in the law. In addition, this judgment also brought about property rights and free trade concerns.³⁶³ The right of buyers to resell or import copies of books legally purchased was infringed upon by this ruling.

4.3.3 Continuation of Restrictive Approach: Eurokids Case

The narrow view expressed in *Penguin* was reiterated by the ruling in *Eurokids International Pvt. Ltd. v. India Book Distributors* (2005).³⁶⁴ Here, the Court, in the absence of any independent analysis of the principle of exhaustion, simply relied on its prior decision. It ruled that unauthorized importation of copyrighted books amounts to infringement, thus restricting the applicability of exhaustion.³⁶⁵ However, this decision was highly criticized because of the lack of consideration to the amendment made to the Copyright Act in 1994, which incorporated the principle of exhaustion.³⁶⁶ Also, the Court did not analyse the relevance of the words “copies already in circulation” under Section 14. Moreover, the Court neglected the principle that the right holder loses his/her control over any copy after selling it. In light of the above, the Eurokids ruling added another example of narrow interpretation of the principle of exhaustion.

4.3.4 Recognition and Limitation: Warner Bros. Case

The more sophisticated judicial approach towards the doctrine may be seen from *Warner Bros. Entertainment Inc. v. Santosh V.G.* (2009), where the Delhi High Court officially acknowledged the existence of the doctrine of exhaustion and its limitations.³⁶⁷ According to the Court, once the lawful copy of the work is sold, the ability of the copyright owner to prevent any further distribution of the copy will be limited. It was a significant landmark in acknowledging the First Sale Doctrine in India.³⁶⁸ At the same time, it should be noted that the Court also established the fact that the doctrine of exhaustion cannot be applied in equal measure to all kinds of works. More specifically, the Court declared that the doctrine of

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Eurokids Int'l Pvt. Ltd. v. India Book Distribs.*, 2005 (31) PTC 145 (Bom).

³⁶⁶ *Id.*

³⁶⁷ Basheer, *supra* note 3, at 1

³⁶⁸ *Warner Bros. Entm't Inc. v. Santosh V.G.*, 2009 (39) PTC 449 (Del).

exhaustion will not be applicable to cinematographic films in an equal manner due to a special provision of Section 14(d)(ii). In this regard, the owner is allowed to continue selling or hiring out copies of the film even ³⁶⁹after the first sale. In this respect, the owner of the copy will have continued control on renting out copies of the film; thus, exhaustion does not apply. This led the Court to conclude that such actions as importing and renting out of DVDs amounted to an infringement. Although this was a good thing, it only made clear the fragmentary nature of exhaustion in India.

4.3.5 Judicial Confusion on Parallel Importation

Parallel Importation has been among the most controversial issues in interpreting the doctrine of exhaustion under Indian copyright law.³⁷⁰ The courts have found it challenging to determine whether the importation of legitimate copies from outside the jurisdiction can be allowed. Penguin Books and Eurokids took the strict approach regarding importation of copies and regarded it as an act of infringement. However, such judgments have been heavily criticized as they lack comprehension of the statutory scheme and the doctrine of exhaustion. From the documents that have been uploaded, there are no rights concerning importation of copies according to the Copyright Act.³⁷¹ Section 14 talks about publication of copies whereas Section 51 pertains to reproductions of infringing copies. This makes the legal status of parallel importation ambiguous. Although courts have traditionally limited parallel importation, there appears to be no clear legislative authority for doing so. More recent judicial interpretations indicate that it would appear India supports international exhaustion and permits parallel importation of authentic products. Such an interpretation is drawn from the lack of any express prohibitions in the Act.³⁷²

4.3.6 Influence of the 1994 Amendment on Judicial Interpretation

In addition, the amendment of the Copyright Act in 1994 played an important role in the development of exhaustion.³⁷³ The idea of "copies that have already been put into circulation" has made the recognition of exhaustion easier. Nevertheless, there were cases in which the amendment had no impact on the decision of the court. For instance, in the case of Eurokids,

³⁶⁹ Id.

³⁷⁰ Copyright Act, 1957, § 14(d)(ii) (India).

³⁷¹ Basheer, *supra* note 3, at 112

³⁷² Id.

³⁷³ Id.

this amendment was practically ignored. Nevertheless, in some cases, the amendment was interpreted in such a way that exhaustion received an opportunity to be better justified.³⁷⁴ This is because of legislative intent of limiting control by copyright owners beyond the first sale.

4.3.7 Judicial Interpretation in Relation to Property Rights

The courts in India have also attempted to address the connection between copyright law and property law.³⁷⁵ The exhaustion theory acts as an intermediary in these fields by guaranteeing that the owner of a copy acquires some rights. In theory, when someone buys a copy of the work, they are entitled to enjoy it, sell it, or give it away. In reality, however, the courts have occasionally interpreted this principle in ways that undermine its validity.³⁷⁶ For instance, in the Penguin case, the court ruled that copyright law can supersede property law in that copyright holders can prevent the sale and importation of their books.

4.3.8 Judicial Challenges in the Digital Context

There are some issues arising out of applying the principle of exhaustion in the digital world.³⁷⁷ Though the cases that have been uploaded here deal mainly with tangible objects, there is still the issue of the ineffectiveness of the concept in digital dealings. In most of the digital dealings, the action involved is reproduction as against distribution. As the reproduction right cannot be exhausted, the courts have found it difficult to apply the principle of exhaustion. There is a considerable gap in the law in this aspect.³⁷⁸

4.3.9 Recent Judicial Trends and Evolving Approach

However, recent trends in the judicial system indicate an effort to make the doctrine of exhaustion more nuanced in its use.³⁷⁹ The need for a compromise between the needs of the copyright owner on one side and those of the consumers as well as economic efficiency on the other side is being increasingly recognized. However, the problem still lies in the absence of

³⁷⁴ Copyright (Amendment) Act, 1994 (India).

³⁷⁵ Basheer, *supra* note 3, at 115.

³⁷⁶ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (190

³⁷⁷ *Penguin Books Ltd., A.I.R.* 1985 Del. 29.

³⁷⁸ Mihály Ficsor, *The Law of Copyright and the Internet* 600 (2002).

³⁷⁹ *Id.*

legislation on the issue.³⁸⁰ This trend in the judicial system can be seen as the effort to make the theory fit in modern conditions.

It is apparent that the doctrine of exhaustion has been interpreted in an ever-evolving manner by the Indian courts. Although the doctrine has been accepted by the court, the methods have differed from case to case. For example, in the cases of *Penguin* and *Eurokids*, a narrow perspective was applied to interpret exhaustion. In contrast, in the case of *Warner Bros.*, although the doctrine was accepted, its scope was limited by statutory provisions. In addition, due to the ambiguous statutory law, the interpretations of the doctrine of exhaustion have varied from time to time. Matters relating to parallel imports, territorial scope, and digital distribution have not yet been clarified by the courts. However, it can be stated that the interpretation of the doctrine of exhaustion in the court of law has been critical in determining the future course of the doctrine.

4.4 Application of Exhaustion to Physical Works in India

4.4.1 Introduction to Exhaustion in Physical Context

The doctrine of exhaustion, popularly known as the First Sale Doctrine, holds its best-known and traditional application with respect to tangible works.³⁸¹ In India, the doctrine applies mainly to tangible copies like books, CDs, DVDs, etc.³⁸² It may be easier to apply the doctrine to tangible copies because there is no issue of reproduction of the work involved, only the transfer of the tangible copy. In the case of Indian copyright law, while the doctrine itself is not enshrined by law, it may be said to have been implied through legal reasoning under Sections of the Copyright Act of 1957, notably Section 14.³⁸³ The basic principle underlying exhaustion is that if a tangible copy has already been put into circulation after sale, the control of the copyright holder with regard to the copy is exhausted.³⁸⁴

³⁸⁰ Basheer, *supra* note 3, at 118.

³⁸¹ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

³⁸² Copyright Act, 1957 (India).

³⁸³ *Id.*

³⁸⁴ *Id.*

4.4.2 Statutory Basis for Physical Exhaustion

The use of exhaustion in respect of tangible objects in India is based on the language of Section 14, according to which the copyright owner has the right to sell copies of the work “to the public not being copies already in circulation.”³⁸⁵ This means that after a copy is sold, it goes into circulation, and the copyright owner does not have the right to exercise control over its further circulation. It follows from this statutory provision that the distribution right only covers the initial sale of the copy. The subsequent acts related to the disposal of the tangible object by the purchaser will not involve any infringement of copyright since the sale has already happened. Such an approach is reasonable because at this point the copyright owner receives the money for which he claimed when selling a copy. Further control over the copy is an infringement of copyright monopoly.³⁸⁶

4.4.3 Distinction Between Ownership of Copy and Copyright

One of the most important factors when applying the principle of exhaustion to tangible works is the difference between owning a copy and owning copyright.³⁸⁷ In other words, when a person buys a copy of a work, such as a book, he or she only owns this tangible copy but not the copyright of the work. This fact is essential for understanding the essence of exhaustion. A person may resell his copy, but he is prohibited from reproducing the work and creating new copies of it. The principle of exhaustion guarantees that copyright laws do not restrict ownership over tangible property.³⁸⁸

4.4.4 Application to Books and Literary Works

Exhaustion is easiest explained with reference to books or any other form of literature in India.³⁸⁹ After lawfully selling the book to someone, the owner can then choose to re-sell, lend, or give out the book to another person without having to seek permission from the copyright holder.³⁹⁰ However, the judiciary has at times interpreted exhaustion in such a way as to make it impossible for the principle to be realized. For instance, in *Penguin Books Ltd. v. India Book Distributors*, the Delhi High Court prohibited the importation of books, thus rendering

³⁸⁵ Id.

³⁸⁶ Id.

³⁸⁷ Goldstein & Hugenholtz, *International Copyright* 290 (3d ed. 2013).

³⁸⁸ Id.

³⁸⁹ Id.

³⁹⁰ Id.

exhaustion impossible.³⁹¹ Nevertheless, the statutory position, coupled with subsequent judicial interpretation, clearly indicates that exhaustion does apply to physical books after lawful sale.

4.4.5 Parallel Importation of Physical Works

Exhaustion when applied to tangible works is directly related to the problem of parallel imports. Parallel imports imply the importation of authentic goods from other countries without any permission from the copyright holder.³⁹² There is no provision in the Indian Copyright Act regarding the prohibition on the import of authentic copies. According to Section 51, what is banned is the import of infringing copies and not authentic ones.³⁹³ This implies that according to exhaustion, the import of authentic goods is legal. But some judgments, such as that of Penguin and Eurokids, tend to be strict in their interpretation. These interpretations imply that the law of India is in favor of international exhaustion where authentic goods can freely move between nations.³⁹⁴

4.4.6 Application to CDs, DVDs, and Other Media

Where the exhaustion of copyrights has been applied to physical mediums like CDs and DVDs, it becomes difficult because of the statutory provisions regarding them.³⁹⁵ As far as sound recordings and cinematograph films are concerned, there is a provision in the Copyright Act according to which, even if the copyright owner sells or gives on hire copies, his rights to do so shall cease on the first sale.³⁹⁶ It means that in the case of sound recordings and cinematograph films, the principle of exhaustion cannot be applied completely. Though the ownership of the physical medium passes to the buyer, yet some control remains with the copyright owner in matters of rental. The Warner Bros. v. Santosh V.G. case clarifies this point very well.³⁹⁷

³⁹¹ Penguin Books Ltd. v. India Book Distribs., A.I.R. 1985 Del. 29.

³⁹² Shannad Basheer, Parallel Imports and Indian Copyright Law, 3 J. Intell. Prop. L. & Prac. 100, 112 (2008).

³⁹³ Copyright Act, 1957, § 51(b)(iv) (India).

³⁹⁴ Basheer, *supra* note 12, at 115.

³⁹⁵ Copyright Act, 1957, §§ 14(d)(ii), 14(e)(ii) (India).

³⁹⁶ *Id.*

³⁹⁷ Warner Bros. Entm't Inc. v. Santosh V.G., 2009 (39) PTC 449 (Del).

4.4.7 Role of Property Law Principles

The relationship between exhaustion and physical copies is very much dependent upon property law concepts.³⁹⁸ When someone buys an item physically, he owns the item outright and can dispose of it. In such cases, the doctrine of exhaustion ensures that the rights of copyright do not interfere with the owner's property rights.³⁹⁹ Thus, once the item has been disposed of, the copyright holder cannot exert any control over the way the copy is used. It is vital that this equilibrium be maintained so as to ensure that there is no unfairness within the legal framework of copyrights.

4.4.8 Economic and Market Implications

Exhaustion, when applied to tangible items, is economically relevant for several reasons. For instance, it allows the creation of secondary markets where items can be reutilized.⁴⁰⁰ This contributes to efficiency as it means that the same items may be used by different people in succession. Exhaustion also helps consumers in the sense that it makes available second-hand items at relatively lower prices.⁴⁰¹ This is because, without exhaustion, copyright owners would have control over each successive transaction of copyrighted work.

4.4.9 Limitations and Challenges in Application

Although the doctrine of exhaustion is undoubtedly applicable to tangible objects, there are a few limitations that exist with regard to the doctrine in India.⁴⁰² The judicial interpretation of the doctrine may sometimes limit the scope of the doctrine, especially when it comes to the aspect of importing goods. There are several ambiguities within the legal system regarding the application of the doctrine.⁴⁰³ The legislation does not mention whether the exhaustion will be international or national, resulting in contradictions.

The use of exhaustion doctrine in relation to tangible objects in India forms the most consistent and conventional part of the doctrine.⁴⁰⁴ The doctrine has been interpreted from statutory provisions with the help of property law principles. Although there has been a clear application

³⁹⁸ Landes & Posner, *The Economic Structure of Intellectual Property Law* 40 (2003).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Basheer, *supra* note 12, at 118.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

of the doctrine on literary works like books, the application of exhaustion doctrine has been narrow for specific classes of works like films and sound recordings. Moreover, judicial opinions have added complexity in the legal situation concerning parallel importation.⁴⁰⁵ Nevertheless, the exhaustion doctrine applied to tangible works is an illustration of maintaining copyright protection and free trade simultaneously.

4.5 Legal Position on Digital Exhaustion in India

4.5.1 Introduction: Transition from Physical to Digital Environment

The theory of copyright exhaustion, which is based on the transfer of ownership of physical copies, poses various difficulties in the context of the modern day.⁴⁰⁶ As regards India, the laws relating to copyright have been enacted taking into consideration physical works only, whereby ownership of the copy passes from the copyright owner to the buyer when sold by him.⁴⁰⁷ The development of technology has, however, revolutionized the mode of distribution of copies of works of authorship, as access is more important than possession. With the advent of digital technology, there has been a paradigm shift in the method of distribution and access to e-books, software, audio and video music files and films is not restricted to just the physical means but is made available over the Internet and through download or stream facilities.⁴⁰⁸ The uploaded material brings out the dilemma as to the applicability of the doctrine of exhaustion on account of the very nature of transfer of digital works.⁴⁰⁹ There is, however, no clarity as regards digital exhaustion under Indian laws and statutes.

4.5.2 Statutory Framework and Its Limitations

Copyrights in India are governed by the Copyright Act, 1957.⁴¹⁰ As per Section 14 of the Act, copyrights include exclusive rights, namely the right to reproduce, distribute, and communicate the work to the public.⁴¹¹ The principle of exhaustion is implicitly provided in the expression "not being copies already in circulation," which is applicable to the distribution right. Nonetheless, it is evident that the exhaustion principle has been specifically crafted for tangible

⁴⁰⁵ Id.

⁴⁰⁶ Mihály Ficsor, *The Law of Copyright and the Internet* 600 (2002).

⁴⁰⁷ Copyright Act, 1957 (India).

⁴⁰⁸ Julie E. Cohen et al., *Copyright in a Global Information Economy* 500 (4th ed. 2015).

⁴⁰⁹ Id.

⁴¹⁰ Copyright Act, 1957 (India).

⁴¹¹ Id.

copies, wherein one copy moves from one person to another. However, the scenario is entirely different in the case of digital distribution.⁴¹² It would be seen that there is no question of transferring any pre-existing copy, but, rather, there will be a creation of fresh copies during the electronic distribution process. Also, the Act differentiates between various rights, like the reproduction right and distribution right.⁴¹³ Whereas the principle of exhaustion only applies to the distribution right, it cannot be applied to the reproduction right. It is evident that the statutory scheme itself acts as a limiting factor to the principle of exhaustion in the context of digital works.

4.5.3 Central Role of the Reproduction Right in Digital Environment

The first reason for the non-recognition of digital exhaustion in India lies in the significance of the reproduction right in digital dealings.⁴¹⁴ While a transfer of the copy in the real world does not include reproduction, each transaction in the digital realm requires reproduction.⁴¹⁵ For instance, a user who downloads an item creates a copy of it in his computer system. If he transfers the item to another individual, a new copy would be produced by that person. As the reproduction right is the exclusive right of the copyright holder, and cannot be subjected to exhaustion, any act of reproduction requires permission.⁴¹⁶ The above discussion clearly indicates that digital exhaustion is impossible in the Indian context since every transaction requires reproduction of the item.

4.5.4 Licensing Models and Absence of Ownership

Yet another important aspect impacting digital exhaustion in India is the prevalence of licensing models.⁴¹⁷ While physical products can be bought by consumers, digital objects are usually licensed. In the licensing model, the user will not obtain ownership but will receive the right to use the digital product within certain constraints. Such constraints might prohibit any actions like copying or distributing the object to other people.⁴¹⁸ As indicated by the documents submitted for consideration, digital transactions involving intellectual property rights have completely different terms compared to the ones that do not include these rights. This fact

⁴¹² Id.

⁴¹³ Ficsor, supra note 1, at 605.

⁴¹⁴ Id.

⁴¹⁵ Id.

⁴¹⁶ Id.

⁴¹⁷ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).

⁴¹⁸ Id.

makes the buyer's right extremely limited, which excludes the possibility of obtaining any ownership rights.⁴¹⁹ Therefore, since exhaustion depends on ownership, licensing models have a crucial impact on digital exhaustion.

4.5.5 Judicial Approach to Digital Exhaustion in India

One may say that there is no specific principle of exhaustion in relation to the digital realm in India. However, some of the court decisions can be regarded as giving certain indications for the future development of the matter.

Thus, the court decision **Super Cassettes Industries Ltd. v. Myspace Inc. (2016)**⁴²⁰ can be considered a landmark ruling for analyzing the functioning of the Indian judiciary in terms of handling copyright-related issues within digital space. In spite of the fact that this ruling relates to the issue of intermediary liability in case of online copyright infringement, it provides important hints on why the exhaustion doctrine is inapplicable to digital products. To put it more precisely, in this case, Super Cassettes Industries Limited, the owner of certain copyright to music works, brought a claim against the defendant Myspace which was an internet platform used by its members for uploading content.⁴²¹ The Delhi High Court considered the nature of digital dissemination on various online websites such as Myspace. According to the Court, when copyrighted material is uploaded on Myspace, there are several acts of reproduction and communication to the public at play. For example, when the content is uploaded on Myspace, a copy is made on the server of that website. When another user accesses the content through streaming or downloading, another copy is created or communicated. According to Section 14 of the Copyright Act, 1957, reproduction and communication to the public are exclusive rights of the copyright holder. Reproduction and communication to the public do not get exhausted after the sale of the first copy. Unlike distribution, these two forms of protection can never be exhausted and continue to vest with the copyright holder. The above point clearly demonstrates the reason for the non-existence of exhaustion in digital works. As explained in previous paragraphs, in order for a work to be exhausted, there must be only one copy of it sold from one person to another. In other words, there must not be any creation of any copy. Digital content, however, requires making of copies before transferring them to another individual. By its arguments concerning the issue, the Court reveals the difficulties connected with the use of

⁴¹⁹ Cohen et al., *supra* note 3, at 505.

⁴²⁰ Super Cassettes Indus. Ltd. v. Myspace Inc., 2016 SCC OnLine Del 6382.

⁴²¹ *Id.*

exhaustion for digital products. In case the user lawfully owns the digital file, its transmission would be classified as reproduction. Consequently, the action may be regarded as infringement even in the case of exhaustion. Besides, the decision shows the significance the Court attaches to the consideration of the online environment while making content available to the general public. The Court believes that the function of platforms like Myspace as communicators to the public needs to be stressed, taking into account that individuals are able to use Myspace to gain access to the content whenever they want. Hence, distribution is not the only right associated with digital dissemination. Furthermore, the Court's decision reveals the way of looking at the application of copyright rules in the digital era from the point of view of India's judiciary. Based on the Court's focus on reproduction and communication rights, it may be concluded that the present-day legal system takes into account the interests of the copyright owners in cyberspace. From the above discussion, it is evident that the case of *Super Cassettes v. Myspace* is an example of digital dissemination where there is the occurrence of numerous levels of protected actions like reproduction and communication to the public. Considering that the rights involved are not subject to exhaustion, the application of the first sale doctrine to digital products can not be possible. As a result, the case is supportive of the argument that exhaustion does not apply to digital products in India.

Tips Industries Ltd. v. Wynk Music Ltd., decided in the year 2019,⁴²² is one of the major cases in Indian copyright law regarding digital exhaustion. The case is significant in establishing the legal status of digital exhaustion within copyright law. The case began after Tips Industries, who was the copyright holder of an extensive library of music, approached the court against Wynk Music, which was an online streaming and downloading website owned by Airtel. In this regard, Wynk used to provide both downloading as well as streaming of music. After the expiry of the license agreement between Tips Industries and Wynk, Wynk started providing music by arguing that it was entitled to do so through statutory licensing provisions in the Copyright Act.⁴²³ A significant question that was presented before the high court in Mumbai was whether downloading of music digitally, even in an offline mode, would amount to distribution of copies alone, or whether such an act would constitute reproduction of the copyrighted material. The point behind this was that the principle of exhaustion did not apply to reproduction, but merely applied to distribution. According to the decision, the downloading

⁴²² *Tips Indus. Ltd. v. Wynk Music Ltd.*, 2019 SCC OnLine Bom 13243.

⁴²³ *Id.*

of digital music leads to the creation of a new copy of the song on the device of the user. This means that it amounts to reproduction and not distribution. It was made very clear by the Court that, in spite of accessing music via a digital platform, this amounts to a creation of a copy of the song, in a digital version, which comes under the exclusive right of the copyright holder as per Section 14 of the Copyright Act. This is important because it creates a clear difference between the two kinds of transactions – physical and digital. In the former, where the item in question is a physical item like CDs or a book, a copy gets transferred from one individual to another without the creation of any further copies. In this situation, the doctrine of exhaustion comes into play. In the case of digital goods, however, such a transfer does not occur. In fact, what happens in such a transaction is that a new copy is created. Therefore, the original copy stays with the seller or the platform, and another copy is made for the purchaser of the digital good. The act described above clearly does not fall within the definition of distribution, and hence exhaustion can hardly apply in such cases. Moreover, the Court also pointed out that exhaustion of digital goods could severely compromise the rights of copyright owners. Allowing the exhaustion of digital copies means that people will be able to freely distribute copies without obtaining any prior permissions from the copyright owner, which could hurt the financial interest of the copyright holder. Finally, the Court also refuted Wynk’s claim that downloading and streaming digital files should be treated in a manner similar to that in which physical copies are sold. On the contrary, downloading and streaming works are governed by a different principle, i.e., licenses, not ownership. In conclusion, it is clear from the above analysis that this judgment finally clarifies that the First Sale Doctrine is not applicable in the case of digital goods in India. Since the First Sale Doctrine is not applicable in relation to the reproduction right, it is clear that the copyright holder retains full control over the digital good even after its release for consumer use. In conclusion, the case of Tips Industries v. Wynk Music is a landmark judgment in the field of copyright law in India. It clearly brings out the difficulties involved in applying doctrines like exhaustion to the digital environment. The fact that the Court recognizes that the act of downloading a digital product is one involving the exercise of the right to reproduce and not the right to distribute clearly indicates that there can be no digital exhaustion in India. In conclusion, it is evident from the above cases that the Indian judiciary is aware of the limitations in applying the First Sale Doctrine to the digital environment.

4.5.6 Digital Copies and the Concept of Circulation

The term “circulation” is integral to exhaustion; however, the term becomes questionable in the case of digital materials.⁴²⁴ While a physical copy is circulated when it passes from one individual to another, digital copies are not subject to circulation in the same sense. Rather, digital copies undergo duplication and transmission. As a consequence, several copies may be present at any given time, making it hard to pinpoint an exact copy sold by the copyright holder.⁴²⁵ The documents presented for uploading reveal that exhaustion depends on the notion that the copy is circulating under the permission of the copyright holder. The concept does not fit the digital distribution process very well. Thus, the principle of exhaustion cannot be readily applied to digital copies.

4.5.7 Software and Limited Recognition of Digital Exhaustion

Digital exhaustion becomes an important issue in the context of software because software is considered as a literary work under Indian copyright laws.⁴²⁶ Apart from being a literary work, computer software is also entitled to some other rights such as the right to rent. There are different types of reproduction that do not amount to copyright violation as per the provisions of the law. Some of these acts of reproduction include copying for personal use and interoperability and cannot be compared with the theory of digital exhaustion.⁴²⁷ Software is mostly available to the users as per the terms and conditions of the licensee agreement and hence the concept of exhaustion does not apply to this software at all. Digital exhaustion would apply only in certain cases of software but not other downloadables over the internet.

4.5.8 Policy Considerations: Balancing Interests

There are several policy implications associated with digital exhaustion.⁴²⁸ While on one side, the copyright holder wants to prevent any illegal copying or sharing of his work, on the other side, the consumer has an expectation of owning the purchased item. It was highlighted in the uploaded documents that exhaustion ensures efficient markets as it reduces transaction costs and enables unrestricted circulation of goods.⁴²⁹ Extending exhaustion to digital works will

⁴²⁴ Ficsor, *supra* note 1, at 620.

⁴²⁵ *Id.*

⁴²⁶ Copyright Act, 1957, § 2(o) (India).

⁴²⁷ *Vernor*, 621 F.3d 1102.

⁴²⁸ Landes & Posner, *The Economic Structure of Intellectual Property Law* 45 (2003).

⁴²⁹ *Id.*

render the copyright ineffective as copying will become rampant. The above-discussed conflicting issues are very hard to reconcile with each other. In India, the approach favors the protection of copyright holders, especially in the digital space.

4.5.9 Comparative Influence and Global Context

Even though the Indian legal system has not acknowledged digital exhaustion explicitly, it is still guided by international practices. According to the sources, there is no universal agreement on the matter, and jurisdictions take divergent paths in their approaches. For instance, certain jurisdictions acknowledge restricted digital exhaustion in certain situations, such as software. Nevertheless, most jurisdictions are cautious about this notion owing to the dangers linked to digital reproduction. India adopts an international approach to this matter.

4.5.10 Emerging Challenges and Need for Reform

India has several uncertainties and lacunae when it comes to the issue of digital exhaustion under the current laws.⁴³⁰ There is an urgent requirement for reforming the existing legislation so as to provide clarity about various concerns associated with digital ownership, licensing, and cross-border distribution. Until such reforms are made, there will remain reliance on existing rules which might not suit the scenario at all. The materials posted above make it clear that any future development in the sphere of copyright law must keep in mind advancements in technology and change in consumer behavior.⁴³¹

While exhaustion applies to the physical copies of the work, it does not apply to digital copies since doing so would raise certain challenges.⁴³² The primary challenge lies in the significance of the right of reproduction, licenses employed in digital products, and non-existence of any interest in digital distribution, thus making digital exhaustion impossible. This approach finds confirmation from courts, who emphasize the importance of differentiation between physical and intangible distribution. Therefore, exhaustion does not apply in relation to the digital works in the current Indian legal system. In conclusion, while India shows considerable caution in terms of digital exhaustion, such caution serves as an effective means of protecting rights holders, it is clear that some reforms are required.⁴³³

⁴³⁰ TRIPS Agreement art. 6, Apr. 15, 1994.

⁴³¹ Id.

⁴³² Cohen et al., *supra* note 3, at 510.

⁴³³ Ficsor, *supra* note 1, at 625.

CHAPTER - 5

Chapter 5: Comparative Analysis of Digital Exhaustion

5.1 Introduction to Comparative Copyright Exhaustion

Exhaustion as a doctrine is intended to provide a balance between the interests of copyright holders and users.⁴³⁴ It can vary from one country to another, however, because of differences in economic policy considerations, technological development etc. Legal comparison can help us better understand the issues related to the development of exhaustion and find out what best practices can be adopted. When it comes to the issue of digital exhaustion in India, which still remains unclear, the comparative method will be extremely helpful for developing a solution that would help us adopt our legal framework to this specific area.

5.1.1 Concept and Purpose of Comparative Analysis in Copyright Law

Legal comparison can play an important role when it comes to analyzing the development of copyright doctrines. When it comes to comparing copyright doctrines of exhaustion and first sale doctrine, it is especially important due to the fact that the interpretation of exhaustion may differ significantly from one country to another. Based on the uploaded material, copyright legislation despite being international is territorial in nature which means that each jurisdiction retains the right to determine the terms under which exhaustion applies. Exhaustion as a doctrine is intended to provide a balance between the interests of copyright holders and users.⁴³⁵ It can vary from one country to another, however, because of differences in economic policy considerations, technological development etc. Legal comparison can help us better understand the issues related to the development of exhaustion and find out what best practices can be adopted. When it comes to the issue of digital exhaustion in India, which still remains unclear, the comparative method will be extremely helpful for developing a solution that would help us adopt our legal framework to this specific area.

⁴³⁴ Daniel J. Gervais, *The Internationalization of Intellectual Property*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 935 (2002).

⁴³⁵ Daniel J. Gervais, *The Internationalization of Intellectual Property*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 935 (2002).

5.1.2 Evolution of Copyright Exhaustion in a Global Context

In each jurisdiction, exhaustion doctrine has developed in a slightly different way depending on differences between various legal systems and economic approaches.⁴³⁶ According to the available documents, the doctrine of exhaustion appeared in the legislation of nations like Germany and the USA where the court decided to impose a limitation on the right of the copyright holder after the initial sale of the work. Gradually, the exhaustion doctrine was included in the international discourse on copyright issues. However, while international treaties may establish this doctrine, they do not require a particular model to be adopted by the member states because every country is free to choose what kind of exhaustion policy to adopt. Thus, there are national, regional, and international versions of exhaustion. This lack of harmony is especially important from the point of view of digitalization as copyrighted works can easily become accessible in other countries. Therefore, comparative analysis will prove beneficial.

5.1.3 Importance of Comparative Study in the Digital Environment

There are stronger reasons in the context of the digital world for comparative analysis. The advent of the digital era has made a profound impact on the manner of doing business related to copyright protection. Rather than owning copies, users access materials through downloading them.⁴³⁷ The uploaded material reveals the fact that distribution through the digital medium poses significant legal questions in the area of reproduction, licensing, and communication to the public. These legal questions are answered differently under various legal regimes, which creates divergent results. For instance, there have been efforts in some legal systems to extend the doctrine of exhaustion to the digital world provided certain requirements were met. At the same time, others refused to do so because of the inherent dangers of digital copying.

5.1.4 Divergent Approaches to Exhaustion Across Jurisdictions

A crucial finding regarding copyright exhaustion based on the materials uploaded to support the work is the lack of uniformity in approaches towards this issue around the globe. Various approaches are used in different jurisdictions depending on the priorities and needs. Some

⁴³⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁴³⁷ Mihály Ficsor, *The Law of Copyright and the Internet* 421 (2002).

jurisdictions limit copyright exhaustion within their national territory and thus exhaust the rights only within the same country as the one where the sale was made first. Other jurisdictions allow exhaustion within a larger region, and thus the products can be transferred freely within the set of several countries.⁴³⁸ Lastly, some jurisdictions recognize international exhaustion, according to which the copyrighted products can be freely traded across borders after they have been sold legally. The differences in practices are essential from both legal and economic perspectives since they are relevant to the issues of trade and the availability of products to consumers.

5.1.5 Comparative Perspective on Digital Exhaustion

The use of exhaustion in relation to digital works is undoubtedly the most controversial question today when it comes to copyright laws. The uploaded resources suggest that the exhaustion principle cannot be applied traditionally in case of digital works, mainly because of the necessity of reproduction.⁴³⁹ There is also a discrepancy in how this problem is addressed in various jurisdictions. While some jurisdictions recognize partial exhaustion in digital cases, including in relation to software, others have totally ignored this notion. What can be concluded from the comparative perspective is that the notion of digital exhaustion is still not established as a legal concept. Instead, it is rather dynamic.

5.1.6 Relevance of Comparative Analysis to Indian Law

The Indian law in respect of the exhaustion of copyright is marked by confusion and incongruity, especially in light of digital considerations. Even though exhaustion is acknowledged for physical items, there is uncertainty regarding exhaustion of digital items. The uploaded readings show that there is no guidance in Indian law in respect of exhaustion of digital items; therefore, the courts will have to rely on the current legal positions to make their rulings, which is likely to give rise to contradictory legal precedents. Comparative study offers a means of filling the gaps in the Indian law with respect to exhaustion of copyright in digital items. Through studying the experiences of other countries in solving this issue, one may reform Indian law to take into account new requirements of the times.⁴⁴⁰

⁴³⁸ Silke von Lewinski, *International Copyright Law and Policy* 158 (2008).

⁴³⁹ Perzanowski & Schultz, *Digital Exhaustion*, 58 *UCLA L. Rev.* 889, 900 (2011).

⁴⁴⁰ Shamnad Basheer, *Parallel Imports and Indian Copyright Law*, 3 *J. Intell. Prop. L. & Prac.* 100, 110 (2008).

5.1.7 Interaction Between International Law and Domestic Approaches

The role of international copyright treaties like the Berne Convention, TRIPS Agreement, and WIPO treaties in formulating domestic copyright legislation is significant. Yet, none of these treaties prescribes any particular regime on exhaustion. It can be noted from the documents provided that the parties enjoy a degree of freedom in determining their exhaustion laws. This makes it possible for the parties to adapt their legislation according to their requirements, yet at the same time creates disparities among jurisdictions. Such inconsistencies pose challenges to online transactions, especially when they are conducted over multiple jurisdictions.⁴⁴¹

5.1.8 Challenges in Harmonizing Digital Exhaustion

One of the key problems discussed in the uploaded documents is that of ensuring digital exhaustion within a single framework. In light of the international aspect of digital distribution, this problem must be addressed in some way. However, because of the differing legal traditions of each jurisdiction, the creation of an approach for achieving consistency is not an easy task. Such aspects as licensing models, technical protection mechanisms, and questions of reproduction rights play an important part in ensuring that a consistent policy can be established.⁴⁴²

5.1.9 Link with Research Objectives and Dissertation Theme

The discussion of copyright exhaustion comparison in this chapter is linked directly to the objectives of this research paper. This research paper will focus on analyzing the effect of digital technologies on the concept of first sale doctrine. In addition to that, the current legal framework in India regarding copyright exhaustion would be examined along with the way in which other countries have dealt with such legal issues. This will enable us to gain an insight into the problems of copyright exhaustion in the digital world.⁴⁴³

⁴⁴¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886; TRIPS Agreement, Apr. 15, 1994.

⁴⁴² UNCTAD-ICTSD, Resource Book on TRIPS and Development 95 (2005).

⁴⁴³ Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights 68 (2007).

5.2 The First Sale Doctrine in the United States (Digital Perspective)

5.2.1 Introduction: Evolution of the First Sale Doctrine in the United States

The First Sale Doctrine in the United States is among the best illustrations of the doctrine of copyright exhaustion. As a limitation placed on the copyright owners' exclusive right of distribution, this principle ensures that when copyrighted materials have been sold legally, the owner of the copyrighted materials may freely sell the copy without having to obtain additional authorization. Over time, this principle has helped facilitate free trade and has had a significant effect on both copyright owners and consumers. It first emerged from some court rulings, the most notable one being *Bobbs-Merrill Co. v. Straus* (1908).⁴⁴⁴ In the case, the US Supreme Court ruled that copyright holders could not enforce any restrictions on the resale of their works by attaching notices to the copies of the works. This ruling marked the beginning of the doctrine, which was eventually formalized into law under Section 109 of the US Copyright Act. Although the doctrine has been working well concerning tangible items, the advent of digital media technology has posed major challenges to its application. From the materials provided, it is evident that technology has changed the dynamics of copyright transactions. As a consequence, the First Sale Doctrine in the US has been reinterpreted significantly in the digital environment.

5.2.2 Statutory Framework: Section 109 of the U.S. Copyright Act

First Sale Doctrine in the United States is established in section 109(a) of the Copyright Act. It provides that a person who is in lawful possession of the copyright shall have the freedom to distribute it further without requiring any permission from the copyright owner. In essence, section 109 of the Act limits the exercise of distribution right only to the first sale. Nonetheless, the distribution of the copyright work cannot be extended to other rights like reproduction, public performance, or public communication.⁴⁴⁵ In digital transactions, the copying of material is common. As such, digital transactions are not covered by Section 109. This is what has led to the courts' decisions that limit the use of the First Sale Doctrine to digital materials. Additionally, Section 109 only covers the "owner" of the material. The owners of the material do not include those who have a license to use the material.

⁴⁴⁴ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); 17 U.S.C. 109 (2018).

⁴⁴⁵ 17 U.S.C. 109(a) (2018).

5.2.3 Distinction Between Ownership and Licensing

One of the developments made within the context of the American approach towards digital exhaustion is the clear-cut distinction between ownership and licensing. In the previous scenario, the buyer bought tangible copies of the works and gained rights of ownership over such copies. The First Sale Doctrine was subsequently applied in this case. However, when it comes to digital goods, it is normally done through the distribution of licences, which only grants limited rights without granting ownership. Such licences usually impose limitations on the user concerning transferability, reproductions, and sale of the digital goods.⁴⁴⁶ Through the uploaded information, one can deduce that the U.S. court system has always adhered to this distinction. In doing this, copyright holders have successfully managed to ensure that the First Sale Doctrine does not apply to their licences.

5.2.4 Role of Reproduction Right in Digital Transactions

It is important to mention that the reproduction right makes a critical contribution in restricting the application of the first-sale doctrine in the digital realm. In particular, the information presented by the uploaded resources suggests that all digital transmissions lead to making copies either via downloading, uploading, or streaming of material. Contrary to physical transmissions when only one single copy moves from one person to another, digital transmissions make it possible to duplicate materials.⁴⁴⁷ Duplicating constitutes the exclusive right granted by the Copyright Act to the copyright holder, and thus cannot be exhausted. Therefore, even having legally purchased a copy digitally, the user will have to obtain permission to transfer it to someone else since the act involves making copies of a copyrighted work.

5.2.5 Capitol Records v. ReDigi: Landmark Case on Digital Resale

This case is considered to be of extreme significance for making decisions within American courts about digital exhaustion. Namely, this case involved a service that allowed the resale of digital copies of music purchased through the iTunes Store. The respondents claimed that such a service was legal because it did not involve creating new copies but only transferring the existing files. As a result, the court disagreed with this view and stated that merely transferring

⁴⁴⁶ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).

⁴⁴⁷ Mihály Ficsor, *The Law of Copyright and the Internet* 610 (2002).

digital files involved reproduction. Namely, the transfer of digital files involves reproduction because even though the original copy is deleted, the new copy will appear on another user's device.⁴⁴⁸ Therefore, the action cannot be covered by the First Sale Doctrine, since it relates only to distribution. In light of this reasoning, the conclusion reached by the court was that the First Sale Doctrine did not apply to digital copies and thus, ReDigi's service violated the right to reproduction held by the copyright owners. This ruling is particularly important in your research project because it demonstrates how digital exhaustion is limited.

5.2.6 Judicial Approach to Digital Exhaustion in the U.S.

American courts have adopted a restrictive stance regarding digital exhaustion. Reproduction rights and the common practice of licensing have prevented the First Sale Doctrine from applying to tangible works.⁴⁴⁹ Based on the uploaded documents, it can be noted that American courts are apprehensive of the possible implications of digital exhaustion with regard to the protection of copyrights. The unrestricted sale of digital products may facilitate unauthorized reproduction and distribution, thereby negatively affecting the financial interests of the copyright holder. Therefore, judicial rulings have focused on protecting the rights of copyright holders instead of extending exhaustion.

5.2.7 Economic and Policy Considerations

It is important to note that the limitations related to digital exhaustion in the USA depend on economic and policy-related factors. In the case of copyright law, the main goal of the legislation is to reward innovation by offering exclusive rights to the authors of the works. In the context of digital technologies, the easy reproduction and distribution of information become major obstacles to achieving the mentioned goals.⁴⁵⁰ For instance, allowing digital exhaustion can make it possible for people to sell the information infinitely, thereby earning nothing from the sale. At the same time, it should be acknowledged that digital exhaustion can negatively affect consumers' rights because they cannot sell the content.

⁴⁴⁸ Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018).

⁴⁴⁹ Id.

⁴⁵⁰ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 45 (2003).

5.2.8 Impact on Secondary Markets

The First Sale Doctrine has historically been instrumental in encouraging secondary markets for physical goods. Consumers can buy and sell second-hand copies, leading to increased efficiency. However, since digital goods are not exhausted, a secondary market cannot develop in that realm. Consumers cannot resell digital copies, and the entity that provides such an option will face legal troubles. As seen from the ReDigi case, setting up a secondary market for digital items presents several challenges. The court's decision makes it almost impossible to legally resell digital products.

5.2.9 Comparative Relevance to Indian Law

There are significant lessons from the US approach to digital exhaustion, which will be helpful in formulating a policy towards digital exhaustion in Indian copyright law. There are several similarities between the two jurisdictions in terms of implementing the doctrine of first sale in the context of digital works.⁴⁵¹ The focus on reproduction rights in US courts is analogous to that in Indian courts, such as in the case of *Tips Industries Ltd. vs Wynk Music Pvt. Ltd.* It should be noted that both jurisdictions acknowledge the copying aspect of digital works, which makes it clear that exhaustion does not apply to such works.

5.2.10 Conclusion

Nevertheless, the First Sale Doctrine in the U.S. still constitutes a significant principle of the country's copyright legislation. However, its application to the digital era is significantly limited due to the presence of reproduction and licensing models. Moreover, judicial interpretation of the doctrine in recent cases, such as *Capitol Records v. ReDigi*, proves that courts focus on differentiating distribution from reproduction. In view of that, there cannot be any digital exhaustion of copyrighted works in accordance with U.S. legislation. The aforementioned approach to solving copyright-related issues in the context of digital distribution demonstrates that courts seek to achieve a certain balance in the matter. Nonetheless, numerous questions emerge in terms of consumers' rights protection and overall

⁴⁵¹ *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018).

efficiency of the current situation. With regard to your dissertation, the U.S. case is worth considering due to its exemplifying nature.⁴⁵²

5.3 Digital Exhaustion under European Union Law

5.3.1 Legal Framework Governing Exhaustion in the European Union

The doctrine of copyright exhaustion within the European Union is deeply connected to the objective of creating a unified internal market that allows the free movement of goods while maintaining adequate protection for intellectual property rights. Unlike national systems, the EU adopts a regional approach to exhaustion, meaning that once a copyrighted work is lawfully placed on the market within the European Economic Area (EEA), the copyright owner's distribution right over that specific copy is exhausted within that region. This framework is essential to prevent the fragmentation of markets and to ensure consistency across Member States.⁴⁵³

The legal foundation of exhaustion in the EU is primarily derived from the Information Society Directive (InfoSoc Directive) and the Software Directive. The InfoSoc Directive establishes that the distribution right is exhausted only upon the first sale or transfer of ownership of a tangible copy within the EU. This provision clearly limits the application of exhaustion to physical goods, thereby excluding digital works such as e-books, music downloads, and online films. The Directive also introduces the concept of the "making available" right, which governs digital transmissions and remains under the control of the copyright owner.⁴⁵⁴

In contrast, the Software Directive adopts a slightly broader formulation. It provides that the distribution right in a copy of a computer program is exhausted upon its first sale within the EU, without explicitly restricting this to tangible copies. This distinction has allowed the Court of Justice of the European Union (CJEU) to interpret the doctrine more flexibly in the context of software.⁴⁵⁵

The uploaded materials highlight that this dual framework creates a complex legal landscape, where exhaustion is clearly recognised for physical goods and selectively applied to digital

⁴⁵² *Tips Indus. Ltd. v. Wynk Music Ltd.*, 2019 SCC OnLine Bom 13243.

⁴⁵³ Directive 2001/29/EC, art. 4(2), 2001 O.J. (L 167) 10.

⁴⁵⁴ *Id.*

⁴⁵⁵ Directive 2009/24/EC, art. 4(2), 2009 O.J. (L 111) 16.

works. The absence of a uniform rule across all types of digital content reflects the cautious approach adopted by the EU in adapting traditional copyright principles to the digital environment.⁴⁵⁶

5.3.2 Judicial Recognition of Digital Exhaustion: The UsedSoft v. Oracle Case

The ruling in the *UsedSoft GmbH v. Oracle International Corp.* is a major milestone in the evolution of the principle of digital exhaustion in the European Union. The key issue that was raised in the *UsedSoft GmbH v. Oracle International Corp.*⁴⁵⁷ case is whether the re-sale of software obtained by downloading could have been covered under the exhaustion concept. Oracle had sold its software products using downloads and accompanying licences which gave the buyer the right to use the software indefinitely. The plaintiff purchased licences from Oracle's buyers and then resold those to other consumers, who downloaded the software again from Oracle's web site.

The CJEU dismissed Oracle's submissions by deciding that the doctrine of exhaustion applies to downloaded software under certain criteria. In its judgment, the Court ruled that where there is an authorization which grants the right to use the product for life in exchange for payment of money, the deal resembles a sale in nature. Thus, the distribution right is exhausted when the contract is performed, irrespective of whether the product was transmitted physically or electronically. But the Court set out significant parameters. First of all, it was established that the original purchaser should render his copy unusable when selling it. This requirement was intended to guarantee that there was only one copy available.⁴⁵⁸

5.3.3 Limitations of Digital Exhaustion Beyond Software

Although a progressive strategy has been applied in *UsedSoft*, the acknowledgment of digital exhaustion in the European Union is restricted, and does not apply to many types of digital content. The *InfoSoc Directive* still limits exhaustion to material copies; therefore, digital downloads of e-books, music, and movies are exempted. Legal progressions since then have further constrained exhaustion, through the distinction made between the act of distribution and communicating content to the public. Digital dealings are usually treated as an act of

⁴⁵⁶ Silke von Lewinski, *International Copyright Law and Policy* 160 (2008).

⁴⁵⁷ Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R.

⁴⁵⁸ *Id.*

“making available,” where users are able to access information on the Internet without transferring ownership of the copy. Exhaustion only covers acts of distribution, not “making available.”⁴⁵⁹

As can be seen from the documents provided above, this aspect is considered key to the restrictive policy applied by the EU. First of all, it should be noted that digital services like online music streaming services or online shops use the making available right, which still belongs to the copyright holder once the original purchase is made. Second, in regard to digital exhaustion, the presence of the reproduction right constitutes another obstacle to its application.⁴⁶⁰ This is because the creation of new copies is always inherent to digital transfer and is not covered by exhaustion. These two constraints, grounded in the right to make available and the reproduction right, guarantee that digital exhaustion is limited to a very specific set of instances. Consequently, the EU adopts a piecemeal policy, recognizing digital exhaustion in relation to software products while disregarding it in relation to other digital products.⁴⁶¹

5.3.4 Policy Considerations, Comparative Insights, and Relevance to India

The approach of the European Union towards the digital exhaustion doctrine shows its balanced stance towards several conflicting objectives of regulation. The idea of exhaustion ensures market integration and the free flow of products in the internal market. However, the goal of copyright law includes protecting the interests of rights holders from illegal reproductions. In *UsedSoft* case, a compromise was achieved through recognizing digital exhaustion under certain conditions.⁴⁶² Considering licenses perpetually similar to transfers, the Court took into account some peculiarities of the digital economy. Still, deleting the product eliminates any violation of copyrights. Nevertheless, the refusal to recognize other digital works' exhaustion implies that the European Union is careful about the issue. The EU is aware of the risks of digital copies and wants to keep control over the issue. As can be seen from the uploaded works, digital exhaustion cannot be recognized due to the danger of piracy and revenue losses for right holders.

⁴⁵⁹ Directive 2001/29/EC, *supra* note 1.

⁴⁶⁰ Mihály Ficsor, *The Law of Copyright and the Internet* 505 (2002).

⁴⁶¹ *Id.*

⁴⁶² *UsedSoft GmbH*, 2012 E.C.R.

Comparatively speaking, the EU approach is different from the United States' and India's approaches. In the case of the United States, the general tendency is to avoid the concept of digital exhaustion altogether while the Indian stance is not clear either way, but the EU does provide a certain amount of recognition to digital exhaustion in relation to software only. This is what makes the EU approach more open-minded while at the same time creating a challenge in terms of complexity. As far as India is concerned, the experience of the EU presents a number of lessons. First of all, the fact that there has been recognition of digital exhaustion within the context of *UsedSoft* means that adaptation of old doctrines to new contexts is feasible. However, the EU experience also shows the problems associated with it.⁴⁶³

The law concerning digital exhaustion in the European Union is one that poses challenges in terms of complexity and dynamism under the copyright law. Although exhaustion is a well-defined principle regarding the commercialization of tangible products, the application of the concept of exhaustion concerning digital products is limited in the EU law.

The significant judgment in this regard is in the *UsedSoft GmbH v. Oracle International Corporation* case, which proved that digital exhaustion was possible under some conditions, particularly concerning computer software.⁴⁶⁴

In your dissertation, the European Union angle allows you to create an important comparison point that will highlight the opportunities and constraints that arise from the issue of digital exhaustion. The main thing that needs to be noted here is the necessity of developing a flexible and fair legal framework.

5.4 Comparative Analysis: India vs US vs EU

5.4.1 Comparative Statutory Framework and Conceptual Foundations

The doctrine of copyright exhaustion, which is universally accepted as an exception to the exclusive right to distribute, takes varied forms in different countries as a result of the differing legislative framework employed by these countries in formulating the law. A comparison between India, the US, and the EU will highlight the fundamental difference despite the similarities in the underlying principles. Under the copyright laws in the United States, there is

⁴⁶³ Daniel J. Gervais, *The Internationalization of Intellectual Property*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929, 940 (2002).

⁴⁶⁴ Shamnad Basheer, *Parallel Imports and Indian Copyright Law*, 3 *J. Intell. Prop. L. & Prac.* 100, 115 (2008).

an explicit provision for the doctrine in Section 109 of the Copyright Act. According to this provision, once a copy is made, the owner of such copy is legally authorized to sell off the copy without the consent of the copyright owner.⁴⁶⁵ This is one of the reasons why the application of the doctrine is predictable when it comes to the sale of tangible products. Nevertheless, this legal protection covers only the right of distribution and not reproduction or any other exclusive right. The concept of the doctrine is not directly stated under any section but can be indirectly derived from Section 14 of the Copyright Act, 1957. In particular, it can be seen from the phrase “not being copies already in circulation.” The lack of clarity in the indirect derivation of this concept creates vagueness about its extent and allows for much judicial discretion. The lack of a specific provision has led to varying interpretations by different courts. The EU follows a different path in its harmonised directive, which includes the InfoSoc Directive and the Software Directive. The EU observes regional exhaustion because the free flow of goods is allowed inside the European Economic Area once they have been put on sale legally. In the case of the InfoSoc Directive, the exhaustion applies only to the physical copy, but the Software Directive provides a different perspective for software programs. As per the uploaded documents, there are clear distinctions between the conceptual underpinnings behind the various legal approaches employed by different countries. The American legal system is based on clear statutory provisions, whereas the Indian legal system operates on judicial interpretation. On the other hand, the European Union's legal system balances market integration with copyright laws through harmonized legislation.

5.4.2 Application of Exhaustion to Physical Works

Where physical copies are concerned, all three countries acknowledge the principle of exhaustion, although the extent of this acknowledgment differs. In the United States, exhaustion is most evident through the principle of first sale. Under the principle, a lawful owner may resell or distribute copies such as books, music CDs, and DVDs without restriction. As a result, a robust second-hand market exists, and consumers are provided with more rights. In India, the principle of exhaustion applies to physical copies. Nevertheless, its applicability to various works differs. The exhaustion principle applies to literary works such as books once the lawful sale has been made, and therefore, no permission needs to be sought again for any resale and distribution activities. In other forms of works, such as cinematographic films and

⁴⁶⁵ 17 U.S.C. § 109 (2018); Copyright Act, 1957, § 14 (India); Directive 2001/29/EC.

sound recordings, the situation is different.⁴⁶⁶ For instance, cases such as *Warner Bros. v. Santosh V.G.* show that exhaustion does not grant unlimited rights to the copyright owner. In accordance with its regional approach to exhaustion, the European Union allows copyrighted products that were introduced into the commerce on the territory of the EEA to be freely traded in the Member States. Such an approach is directly associated with the mission of market integration and guarantees that copyright will not prevent the free movement of products within the region. Although there are differences in how exhaustion of rights is implemented in different countries, in the context of physical products, it remains rather consistent. The theory itself provides for a fair balance between the interests of the copyright holder and the freedom of product circulation. It is more problematic when exhaustion is applied to digital products.

5.4.3 Digital Exhaustion: Divergence in Judicial Interpretation

The most substantial difference between India, the United States, and the European Union occurs in relation to digital exhaustion. As noted by the uploaded sources, the most critical difference between physical and digital transactions is that while the former entails merely distribution, the latter involves reproduction. It has been definitively stated by the courts that the application of the doctrine of exhaustion to digital works is impermissible in the United States. This has been explicitly stated in the case of *Capitol Records, Inc. v. ReDigi Corp.*, wherein the court has stated that selling digital works constitutes reproducing new copies of the copyright material. As a result, the principle of exhaustion does not apply since reproduction is governed by Article 9(2)(a).⁴⁶⁷ The law pertaining to digital exhaustion in India is not quite settled. However, the decisions of courts in the case of *Tips Industries Ltd. v. Wynk Music Private Ltd.* and *Super Cassettes Industries Ltd. v. Myspace, Inc.* clearly indicate that when it comes to digital works, the distinction between the reproduction right and the right to communicate to the public must be made. Conversely, the EU adopts a much less rigid position when it comes to this particular issue. According to the decision made by the Court of Justice in the *UsedSoft v. Oracle* case, exhaustion may apply in instances of perpetual license-based selling of software. The court compared perpetual licenses to selling and therefore made use of exhaustion principle in its decision. This decision can only apply to software products but cannot be used for any other kind of digital media such as e-books or music. Based on this, one may conclude that the difference in approaches adopted by the two courts in their jurisdictions

⁴⁶⁶ *Id.*

⁴⁶⁷ *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018); *UsedSoft GmbH*, 2012 E.C.R.

can be explained by different policies adopted by each jurisdiction. From the information above, it becomes clear that whereas the US and India prioritize reproduction rights, the EU is looking for a balanced approach in certain instances.

5.4.4 Policy Considerations, Market Impact, and Implications for India

It is found that the issue of digital exhaustion is influenced by wider policy issues such as copyright protection, innovations, and availability to consumers. Each country implements a different policy balance among those conflicting interests. The United States places a great importance on the copyright protection issue, especially concerning the digital environment. The denial of digital exhaustion is justified due to the risk of piracy and income loss and the easy replication of digital products. The use of licensing systems reinforces the same attitude by restricting the consumer's right to reuse and resell the purchased item. India employs the same policy but without a clear statutory basis. The focus on reproduction rights and the development of licensing systems illustrate the trend toward strengthening the power of copyright holders.⁴⁶⁸ The EU has adopted a balanced view in incorporating digital exhaustion in certain circumstances while securing other forms of digital items. As seen in the *UsedSoft* case, it was possible to adopt digital exhaustion in the digital sphere without interfering with other provisions in the law. From the readings posted above, it is clear that such cases have an impact on shaping the market environment. The reason why there is no secondary market for digital goods in places where digital exhaustion is not recognized is that people cannot exchange their digital goods; therefore, there is a shift from ownership to access consumption. Considering all these cases, India is faced with the task of formulating its own policy regarding digital exhaustion. It has much to learn from the USA and the EU, especially concerning the challenges and opportunities offered by digital exhaustion.

5.4.5 Conclusion

Based on the above comparative analysis, it is possible to make some conclusions concerning the copyright exhaustion principle in India, the USA, and the European Union. Indeed, all three countries recognize copyright exhaustion for tangible objects. However, they differ in their approach to digital exhaustion. For instance, the United States takes an opposite position since they do not accept digital exhaustion because of reproduction issues. It seems that India follows

⁴⁶⁸ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 50 (2003).

the same path but is less clear about its stance on the matter.⁴⁶⁹ The European Union, in turn, allows digital exhaustion but in a limited way applicable only to software products. Therefore, the EU is more flexible than other states. The reason why such divergent opinions exist lies in the difference in the digital policy in each of the states. Nevertheless, the comparative analysis reveals that the concept of copyright exhaustion should adapt to new conditions and the current goods market. Such findings will help you develop recommendations for your research paper on amending Indian copyright laws.

5.5 Emerging Global Trends in Digital Copyright Exhaustion

5.5.1 Transition from Ownership to Access-Based Digital Economy

One of the major global changes that has a direct impact on the copyright exhaustion doctrine is the shift from an ownership-based economy to an access-based economy based on digitalization. The traditional approach to the copyright law implied that consumers were purchasing tangible copies of protected objects such as books, audio cassettes, and videos. In this case, the copyright exhaustion doctrine was applied since consumers had obtained ownership over these copies and could freely sell, lend, or distribute them. The uploaded articles show that the digitalization process has changed this principle since digital copies are distributed via cloud computing services, streaming media platforms, or subscription systems. In these cases, consumers receive access rights only and have no legal opportunity to obtain ownership over copies. In the first place, courts in both countries acknowledge that access-based model does not fall under the scope of exhaustion since streaming platforms are based on the idea that the consumer accesses the content provided on the platform via making available right. Consequently, the idea of exhaustion does not play any role here anymore and the content belongs entirely to the copyright owner. It is obvious that there are serious implications of the shift described above in terms of consumer rights and tendencies in markets. Although there are certain benefits in using access-based models (in particular, high availability of goods), consumers lose their ownership-related rights (the opportunity to sell and distribute the goods). As far as the uploaded content is concerned, one can say that this is quite a major development in the context of the digital era.⁴⁷⁰

⁴⁶⁹ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights* 70 (2007).

⁴⁷⁰ Julie E. Cohen et al., *Copyright in a Global Information Economy* 520 (4th ed. 2015).

5.5.2 Strengthening of Licensing Models and Contractual Control

Another important worldwide trend worth mentioning is the move towards the use of licensing agreements as a method of distribution of digital works. Licensing does not imply any transfer of copy ownership from the licensor to the licensee, rather granting certain rights according to the terms and conditions. Such terms and conditions typically restrict copying, transferability, etc., hence making exhaustion impossible.

The works uploaded prove that licensing has become one of the important ways through which copyright holders have taken control over their digital works. In contrast to sales, licensing helps copyright holders avoid any provision of exhaustion such as first-sale doctrine.⁴⁷¹

The issue of licensing has received considerable attention in the courts' judgments. In the USA, the court has stated that exhaustion is applicable only to the owners of copies and not licensees. Similarly, licensing has become prevalent in India as well.

Even in the EU, where the *UsedSoft v. Oracle* ruling established exhaustion of digital works of software, the basis of the Court's judgment was that a perpetual license can be equated with sale. This means that the distinction between a license agreement and a sales contract is essential to establish the issue of exhaustion.

The increasing prevalence of licensing agreements in the market is a result of shifting toward contractual control in the domain of copyright law.

5.5.3 Central Role of Reproduction and Communication Rights

Growing significance of rights associated with reproduction and communication also forms an important global trend related to digital exhaustion. It is evident from the uploaded materials that any digital transaction implies reproduction in some form through downloading, streaming, or data transfer processes. Physical transactions do not raise any questions about exhaustion since, in physical transactions, only the transfer from one individual to another takes place without copying or reproducing content.⁴⁷² Digital transactions imply reproduction; however,

⁴⁷¹ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010); *Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R.

⁴⁷² *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018); *Tips Indus. Ltd. v. Wynk Music Ltd.*, 2019 SCC OnLine Bom 13243.

this right can only belong to copyright owners, and it is not exhausted at all. This view is supported by many judicial decisions made in different jurisdictions. Thus, the decision by the US Court in the case *Capitol Records v. ReDigi* demonstrates that digital resale constitutes reproduction and cannot be regulated based on the First Sale Doctrine. At the same time, in India, the decision in *Tips Industries v. Wynk Music* also states that digital downloads are considered reproduction. Reproduction rights have been acknowledged by the European Union as being key in preventing digital exhaustion. Even in the *UsedSoft* case, the deletion of the original copy serves as a testament to the necessity of avoiding unauthorized reproduction. Another right apart from reproduction that has gained prominence with regard to digital exhaustion is the ‘communication to the public’ right or ‘making available’ right. This right controls digital services like streaming websites and is not subject to exhaustion. This means that copyright owners still maintain control over their works despite the first sale or transaction. This indicates the importance of control over copying and accessing in modern copyright law.

5.5.4 Emerging Judicial Trends, Market Implications, and Future Directions

The present condition of international law concerning this issue shows the judicial approach to the implementation of the principle of digital exhaustion, which is conservative in nature. While the necessity for the revision of copyright legislation according to modern realities is recognized, the judicial system is still reluctant to implement the principle of exhaustion in its full extent. For instance, the ruling in *UsedSoft v. Oracle* indicates the readiness of judges to take into account the economic rationale of the transaction.⁴⁷³ This is another indication of the fact that digital products are beyond the scope of the exhaustion principle. However, in countries like the USA and India, the courts have imposed stricter policies on the issue. They have always considered the importance of reproduction and licensing, which has narrowed down the extent of exhaustion in the digital context. Such rulings have far-reaching consequences on the market and consumers. The lack of exhaustion in the digital context has led to the disappearance of secondary markets of digital products. The inability of customers to trade or sell their products has resulted in a deviation from conventional market practices. Moreover, there is also a question regarding consumer welfare in such markets. Additionally, the rising deployment of technological protection mechanisms has also strengthened the control of copyright holders on digital works. Such mechanisms have the ability to prohibit copying

⁴⁷³ Mihály Ficsor, *The Law of Copyright and the Internet* 630 (2002).

and distribution of material. From the uploaded documents, it can be seen that future developments in the field of digital copyright exhaustion would depend on the capacity of legal institutions to strike a balance between the various interests at stake. One set of interests is in favour of copyright holders and the promotion of innovation, while another is interested in consumer rights in the digital space. India could benefit from the lessons that could be drawn from the global developments in respect of digital exhaustion. The experience of the US and Europe is illustrative in this regard.

5.5.5 Conclusion

Global trends in regard to digital exhaustion of copyrights indicate the fundamental change in the essence of copyright law. This is due to several factors, such as the replacement of possession with an access model, the proliferation of licenses, and the emphasis on the rights to reproduce and communicate copyrighted material, which, at the same time, reduces the scope of exhaustion application in the digital environment. Although there have been some attempts to apply digital exhaustion to software in some countries, the general trend still seems to be reserved. Lack of consensus about the concept is also apparent from the legal differences between various countries. As far as your dissertation goes, these global developments give you a solid foundation for your research into the changing nature of exhaustion in copyright law.⁴⁷⁴

5.6 Lessons for India and Need for Legal Reform

5.6.1 Need for Clarity in the Statutory Framework of Exhaustion

Another of the most important lessons from copyright jurisprudence that can be learned by India is the need for statutory clarity regarding the doctrine of exhaustion. While the Indian Copyright Act, 1957 does not contain the First Sale Doctrine, it is implied in Section 14 of the Act by virtue of the "copies already in circulation." Hence, even as the courts have been successful in applying the doctrine to physical objects, it becomes difficult for them to interpret the extent to which the doctrine can be applied to digital objects. It seems from the uploads on reading that in other countries such as the U.S., there are statutory guidelines under the

⁴⁷⁴ Perzanowski & Schultz, Digital Exhaustion, 58 UCLA L. Rev. 889, 950 (2011).

provisions of Section 109 of the Copyright Act that define the scope of the doctrine. This has made the interpretation of the doctrine easy by courts in such jurisdictions despite the doctrine's limited applicability to the digital domain.⁴⁷⁵ In India, however, due to lack of statutory guidelines, there can be various interpretations of the doctrine by courts. For instance, previous cases like *Penguin Books Ltd. v. India Book Distributors* took an overly narrow approach toward the doctrine of exhaustion, especially when it came to importation. The evolution of case laws, such as *John Wiley & Sons v. Prabhat Chander Kumar Jain*, suggests that a more liberal attitude is taken to promote circulation of lawfully sold copies. The discrepancy here points towards the need to establish legislative guidelines in order to determine the scope of exhaustion. In light of the digital era, the lack of legislation becomes even more critical. Relying on copyright legislation, courts have traditionally considered the differences between distribution and reproduction in order to decide whether the doctrine of exhaustion applies. However, in the absence of any specific legislative provision, there remains room for uncertainty. As a result, one of the important reforms is establishing specific legislative guidelines in order to define the scope of exhaustion. The guidelines should take into account such issues as the nature of ownership, impact of the license model, and the difference between reproduction and distribution.

5.6.2 Recognising the Distinction Between Physical and Digital Exhaustion

Another critical lesson for India is that the need for explicit recognition of the key difference between physical and digital exhaustion is evident from the above uploads. Indeed, from the aforementioned materials, it becomes clear that the doctrine of exhaustion presumes the transfer of the copy of the work, without any creation of other copies. On the contrary, digital transfer always implies reproduction, which belongs to the exclusive rights of copyright holders. India's judicial precedents are already moving in that direction. For instance, the courts in *Tips Industries Ltd. v. Wynk Music Ltd.* And *Super Cassettes Industries Ltd. v. Myspace Inc.* held that digital download and internet streaming of content involved reproduction and communication of the work to the public. As a result, the application of the doctrine of exhaustion to digital content appears impracticable. A comparative study confirms the aforementioned lessons. To be more precise, even though the US legal framework has always refused the idea of digital exhaustion, European law recognised its applicability in certain

⁴⁷⁵ Copyright Act, 1957, § 14 (India); Shammad Basheer, *Parallel Imports and Indian Copyright Law*, 3 *J. Intell. Prop. L. & Prac.* 100, 120 (2008).

situations, e.g. in the *UsedSoft GmbH v. Oracle International Corp* case. Another critical lesson for India is that the need for explicit recognition of the key difference between physical and digital exhaustion is evident from the above uploads.⁴⁷⁶ Indeed, from the aforementioned materials, it becomes clear that the doctrine of exhaustion presumes the transfer of the copy of the work, without any creation of other copies. On the contrary, digital transfer always implies reproduction, which belongs to the exclusive rights of copyright holders. India's judicial precedents are already moving in that direction. For instance, the courts in *Tips Industries Ltd. v. Wynk Music Ltd.* And *Super Cassettes Industries Ltd. v. Myspace Inc.* held that digital download and internet streaming of content involved reproduction and communication of the work to the public. As a result, the application of the doctrine of exhaustion to digital content appears impracticable. A comparative study confirms the aforementioned lessons. To be more precise, even though the US legal framework has always refused the idea of digital exhaustion, European law recognised its applicability in certain situations, e.g. in the *UsedSoft GmbH v. Oracle International Corp* case.

5.6.3 Addressing Licensing Models and Consumer Rights

Another key problem associated with the rise of licensing in digital distribution requires a legal solution. The uploaded documents note that digital content is licensed to consumers in ways that infringe on the right to redistribute digital content, among other rights of the user. In countries like the United States, for instance, courts have ruled in favor of the license and against the applicability of the doctrine of first sale. The same situation prevails in India, whereby digital content is distributed based on contract laws that benefit copyright holders. As mentioned above, it is important to consider the rights of consumers in light of the problems mentioned. Physical goods are different in the sense that consumers own the goods and have more freedom compared to consumers of digital products. In this context, the method adopted in *UsedSoft v. Oracle* by the European Union serves as an example of how the problem may be solved. As can be seen from the decision made by the Court, the economic character of transactions rather than their form plays the most significant role when determining whether they may be classified as licences or sales. In other words, if certain licence agreements meet certain requirements, they may be treated as sales, and the principle of exhaustion applies to them. Therefore, in the Indian legal system, there is a need to introduce new norms aimed at

⁴⁷⁶ *Tips Indus. Ltd. v. Wynk Music Ltd.*, 2019 SCC OnLine Bom 13243; *Super Cassettes Indus. Ltd. v. Myspace Inc.*, 2016 SCC OnLine Del 6382.

regulating the use of licences as a way of transferring digital content. Such norms should allow users to retain ownership-type rights to digital copies purchased by them.

5.6.4 Developing a Balanced Framework for Digital Exhaustion

Lastly, the most crucial lesson for India would be to establish a legal framework for digital exhaustion that is well-balanced and futuristic. It can be seen from the uploaded documents that the legal world today has been riddled with uncertainties and divergent positions on the issue. For instance, the United States adopts a strict policy concerning copyright protection, whereas the European Union allows some degree of digital exhaustion in certain cases. At the moment, India does not have a definitive stance on the matter, thereby causing confusion. In establishing its own legal framework on the issue, India should consider striking a balance between various factors. First, there is the need to protect the commercial interests of copyright owners and prevent them from reproducing their digital material illegally. However, there is also the need to safeguard consumer interests. One of the models through which digital exhaustion can be balanced would be recognition of limited forms of digital exhaustion under highly regulated circumstances. From this perspective, the proposed framework for legalizing the resale of digital products would require it is clear that there will be no production of additional copies, like was done in the *UsedSoft* case. Nonetheless, it would be crucial to consider measures that would prevent abuse as well as exploitation of copyright holders. Other aspects that should be considered by the framework of laws include technology protection measures, digital borders transactions, and online services providers. By adopting such an inclusive approach, one would be able to develop a comprehensive set of laws that are both relevant and effective at addressing new challenges emerging in the ever-changing digital environment. In conclusion, one of the objectives of reforming copyright laws would be development of a flexible but predictable model. As indicated from the documents provided in the uploads section, this objective plays an important role in ensuring that the copyright law is viable.

5.6.5 Conclusion

Comparative analysis of the issue of copyright exhaustion in different jurisdictions has several valuable lessons that could be applied to the Indian case. First, the importance of legislative clarity; second, the difference between physical and digital exhaustion; third, licensing models should be regulated. Finally, an efficient legal framework for copyright exhaustion in the digital

era should be developed. Today, India faces some uncertainties concerning its position in terms of copyright exhaustion laws. Therefore, drawing upon experience gained by other countries is highly beneficial for shaping this topic in India. The future development of Indian copyright law will largely depend on its adaptation to new technological circumstances without losing core values associated with copyright exhaustion. Therefore, developing a balanced legal framework regarding digital exhaustion may be one of the most important steps for success in this respect.

CHAPTER - 6

Chapter 6: Findings, Analysis, and Recommendations

6.1 Summary of Key Findings from the Study

This study will conduct an extensive investigation into the First Sale Doctrine or the exhaustion doctrine, focusing mainly on its applicability and limitations in the digital context. From the analysis of relevant literature on theoretical grounds, statutory considerations, judicial opinions, and comparative studies, there are a number of important conclusions that the researcher has reached through the course of this paper which show how copyright law has evolved with time in reaction to the advances in technology.

Perhaps one of the most important conclusions made by this study in this regard is that the concept of the First Sale Doctrine had emerged in order to strike a balance between the rights held by copyright owners and the interests of the public in the free exchange of goods. Traditionally, the copyright regime had bestowed the author of the work with various exclusive rights that included reproduction, distribution, and communication of the work to the public. Unchecked use of these rights could result in undue control being exerted by the copyright holder over the distribution of copies of the work, thus making it difficult for people to access the work.

It has been found that the doctrine has been universally accepted in various legal systems when it comes to dealing with tangible objects. When it comes to material things like books, CDs, and DVDs, the doctrine applies successfully because there is a unique object which can be sold by its owner. Once this object is sold to another person, it means that any further use of that object does not constitute copyright infringement because the economic interests of the copyright owner in regard to that object are exhausted. Moreover, it has been discovered that the doctrine has been supported by various theoretical approaches. According to the theory of property law, it supports the notion of ownership since it enables the owner of a certain property to deal with the object freely. From an economic standpoint, the doctrine eliminates market segmentation and increases competition because people have the right to sell their property freely. However, the study reveals that the switch from the physical world to the digital world has drastically changed the basis of the doctrine itself. The distribution of digital works is different from the transfer of physical goods. It involves reproduction and dissemination via digital means, with the creation of several copies during the process. This has emerged as a

major challenge in applying the principle of exhaustion. One of the key conclusions derived from the current research is that the reproduction right is violated in all digital transactions. The transfer of a work from one person to another does not occur without any reproduction in digital transactions. However, unlike the transfer of a physical good, which can occur without any reproduction, the reproduction right has not been exhausted in the transfer of a work. Moreover, the research demonstrates the rising significance of licensing schemes as a mode of digital content dissemination. Digital content is usually distributed through licensing agreements instead of sales transactions. In particular, the latter provide users with certain rights while imposing limitations on copying, sharing, and transferring. Notably, the principle of exhaustion can be applied only when a copy is sold, and not when a licensing agreement is signed. Therefore, the proliferation of licensing schemes has made the concept of exhaustion practically inapplicable in the digital context. Another important discovery is related to access-oriented business models for content delivery. With the growing popularity of streaming, cloud computing, and subscription services, users have gained access to content without owning a copy of it. As a consequence, the doctrine of exhaustion loses its relevance since it does not apply to situations when the ownership of a copy does not pass from one party to another. Finally, the research focuses on technological protection measures (TPMs). For instance, DRM technology allows copyright owners to manage access to digital copies of works and restrict their unlawful use. Thus, even in case the relevant legal provisions recognised the concept of digital exhaustion, TPMs could limit its scope. In the context of a comparative approach to the topic under discussion, there can be noted some significant differences concerning the use of the doctrine of digital exhaustion in various legal systems. To begin with, it is necessary to mention that the United States judicial system does not admit using the First Sale Doctrine in connection with digital items, since according to the decision of the case *Capitol Records v. ReDigi*, digital transfer is regarded as reproduction and, thus, cannot satisfy the prerequisites of the Doctrine.

However, the EU takes a different approach to the problem discussed, since while the principle of exhaustion is applicable only to tangible copies as stated in the InfoSoc Directive, the EU court recognised the doctrine of digital exhaustion in the case *UsedSoft v. Oracle*, referring to the case of software. In particular, if certain prerequisites – namely, the use of perpetual licenses – were met, the transfer could be treated as sale and cause exhaustion of the item. The legal regime of India, as per the analysis conducted here, has been found to be uncertain and contradictory. The doctrine of exhaustion has no direct statutory basis in the Copyright Act of

1957, rather it can be discerned from other statutory provisions. Even though the Indian courts have accepted the doctrine of exhaustion in relation to tangible work, its acceptance concerning digital exhaustion remains ambiguous. Another major conclusion of the paper is that because of the absence of clear statutory guidance in the Indian laws, the court rulings in different cases are also contradictory. Different cases take different approaches regarding the doctrine of exhaustion, especially concerning the issue of parallel imports.

In addition to that, the research outlines a number of obstacles linked with the implementation of the doctrine within the framework of the digital economy. They consist of the problems linked with differentiating between the distribution and reproduction processes, the use of license-based approaches, the influence of technological protection means, and the international character of digital distribution. This information proves that the classical exhaustion doctrine cannot be applied to the digital environment. Finally, the analysis reveals the overall implications of these tendencies for the consumers' rights and the market processes. The lack of the digital exhaustion doctrine decreases the consumers' opportunities to trade or lease the digital products and increases the control of copyright holders. Moreover, the study reveals that there is no international agreement concerning the use of digital exhaustion. Neither the Berne Convention nor the TRIPS Agreement provides any guidelines in this regard; hence each country can devise its own policy. It means that different jurisdictions are developing their laws, thus making transactions between countries more complicated. Furthermore, the results of the research show that it is crucial to achieve a balanced attitude toward copyrights since copyright protection is essential but cannot be excessive. Otherwise, it would impede people's access to information, and hinder market efficiency. Traditionally, the concept of exhaustion worked as a means to balance the two interests, but it proved inefficient in terms of the digital environment. To conclude, the above discussion highlights the significance of the First Sale Doctrine as an important aspect of copyright law. However, the conventional version of the doctrine turns out to be inefficient due to the change in the mode of distribution. The authors find out that there is an urgent need for legislative amendments regarding the inadequacy of the doctrine in the digital environment. The main goal of such legislative changes can be considered providing clearness, consistency, and balanced protection of copyright owner's interests as well as those of the user. In this way, it will be possible to update the doctrine of exhaustion according to the requirements of the modern world.

6.2 Critical Analysis of the First Sale Doctrine in the Digital Age

First Sale Doctrine as one of the most significant exceptions to copyright legislation has always been extremely significant in maintaining balance between proprietary interest and the public interest. Nevertheless, in the modern world characterized by technological advancements, the significance, scope, and practical application of the mentioned exception are becoming more and more questionable. The following section contains an in-depth analysis of the limitations associated with the implementation of the First Sale Doctrine within the digital environment.

To begin with, from a theoretical point of view, it is necessary to emphasize that the First Sale Doctrine is based on the ownership of a tangible copy of the copyrighted item in question. According to the doctrine, the owner of a copy bought legally may do whatever they wish with it; for example, they may reproduce and distribute it freely without violating any existing laws. Simply speaking, they own their purchase and can use it freely in any manner desired. Nevertheless, in the digital world, copies disappear. One of the primary difficulties associated with the application of the doctrine to digital objects concerns their inherent nature. While traditional products can be transferred from one person to another, the transfer of digital content is actually a reproduction process. When someone transfers a digital file, this means that a new copy will be made on the recipient's device while the original is deleted. Hence, the legal process that takes place in this case pertains to the reproduction right, which is not covered by the exhaustion doctrine. The importance of the difference between these two aspects was explicitly acknowledged in *Capitol Records v. ReDigi*. The court unambiguously stated that selling digital music files is an exercise of the reproduction right and cannot be considered under the First Sale Doctrine. Despite the attempt by the platform to ensure that there were no duplicates, the court highlighted that even the act of creating a new copy is enough to infringe on copyright.

Moreover, the theory does not take into account the non-rivalrous character of digital items. Physical copies are naturally rivalrous since when used by someone else, these copies cannot be used by anyone else at the same time. Thus, the principle of exhaustion is applicable due to the very nature of physical copies because the transfer of ownership presupposes a relinquishment of possession on behalf of the previous owner. Digital items are non-rivalrous; multiple identical copies may be created without decreasing their value. Therefore, applying the doctrine in the case of digital copies makes little sense economically, as there is potential for endless distribution. Another aspect that should be analyzed in the context of the theory

relates to changes in consumption modes. While in conventional situations, the transfer of a copy presupposes the transfer of ownership, new trends suggest shifting from an ownership model to an access model. Digital products are now more often consumed in a streamed way; thus, users do not own a copy but have temporary access to the item. Under such circumstances, the applicability of the exhaustion doctrine seems impossible, as no first sale occurs in the context. This change will have far-reaching consequences for the basis of the doctrine. This development represents a step away from copyright schemes based on ownership toward those based on services, which maintain ownership in the hands of the copyright holder via technical and contractual methods. The doctrine itself is not capable of handling this development, since it presupposes concepts such as ownership and transfer. The growing dependence on licensing contracts adds an additional dimension of difficulty to applying the doctrine. Digital material is often made available under conditions that prohibit the transfer of the goods or its reproduction. The user is usually considered to be a licensee rather than an owner, disqualifying him from receiving the benefits of the First Sale Doctrine. US courts have always recognized this distinction, allowing the copyright holder to avoid exhaustion by contractual means. There is a need for concern from both legal and policy points of view with respect to this phenomenon. The use of private agreements is seen to override the provisions set forth under the first-sale doctrine and hence undermines its intended purposes. In this case, consumers, who feel like buyers, find themselves bound by terms and conditions which restrict their freedoms. As a result, there is a disparity between the perception and reality on the part of consumers which creates a situation termed as "digital ownership illusion." With respect to theory, the use of digital technology seems to contradict the intentions behind the creation of this doctrine. As noted before, the doctrine ensures that copyright owners cannot perpetually exercise control over products. However, in this case, copyright owners are seen to regain control through new means such as licensing and other technologies. Therefore, one wonders whether this doctrine is now irrelevant in light of technological advances. Technological Protection Measures (TPMs) play another important role in this analysis. Copyright holders are provided by technological measures such as DRM the capacity to regulate usage, copying, and distribution of their products. These measures are capable of blocking exercise of those rights that would have been allowed according to the doctrine of exhaustion. For instance, TPMs allow limiting access to content on a number of devices, prohibiting copying of digital copies. Another complex area relates to the application of the doctrine in relation to TPMs. Even though technologies in question receive protection from circumvention, they may at the same time restrict lawful uses of the content protected by copyrights. One more important challenge

associated with the problem of digital exhaustion is related to its regional nature. As it has been stated above, there is no uniform approach to dealing with exhaustion of digital copyrights. The U.S.A. has adopted the restrictive approach. Limited recognition of the principle in question is given by the EU. Finally, India does not take a stand yet. On the contrary, the EU model as seen in the *UsedSoft v. Oracle* case is quite intriguing compared to the US one. In the effort to adjust digital exhaustion to the reality of the Internet, the Court of Justice identified it as applied to software. Nevertheless, the recognition of the principle is restricted and has certain prerequisites – the original copy has to be deleted. What is even more important, digital exhaustion has not been acknowledged for other forms of digital property, thus illustrating difficulties related to its creation. It is noteworthy that the EU approach is quite inconsistent in its interpretation of digital exhaustion. While it was recognized for software, there is no explanation why it cannot be acknowledged for other kinds of digital property. There is an evident lack of legal consistency regarding digital exhaustion. In India, there is no legislative guidance available to tackle the challenges of digital exhaustion. The courts in India have applied general principles of copyright law to determine the issues pertaining to digital exhaustion. In doing so, they have considered reproduction and communication to the public. This strategy of determining the challenges of digital exhaustion complies with the global trend. However, the problem is that this approach does not completely solve the issue of digital exhaustion because it lacks comprehensive guidelines to address all possible scenarios of digital exhaustion. Therefore, the issue of digital exhaustion becomes problematic when it is dealt with in a judicial manner. In the realm of policy, the crucial issue is finding a way to maintain a balance between the interests of copyright holders and those of consumers. On the one hand, effective copyright enforcement is needed to stimulate creativity and investments. On the other side, an overly rigid framework may limit access to information and inhibit secondary markets from emerging. For a long time, the principle of exhaustion was used for this purpose, but in the era of digitalization, it proves to be less and less efficient. When assessing the prospects of further development of the principle of exhaustion in a digital context, it needs to be understood how well it can be adjusted to the modern world. There is an opinion that the only way forward is to create a special version of exhaustion specific for digital products. Other scholars believe that there should be an alternative system based on licensing. On balance, the most important lesson learned from this examination is that the classical theory of first-sale is not relevant to the contemporary technological era. The focus on issues like possession, distribution, and transfer of just one copy reduces the possibility of application to contemporary digital technology and products. Consequently, the classic theory of first sale

holds significant importance in relation to physical work but is irrelevant for digital work. Finally, there is a necessity to make reforms in order to address the challenges of digital exhaustion. Nevertheless, prior to implementing any alterations in the legal framework of current law, the primary distinctions between physical and digital items must be recognized and acknowledged.

6.3 Evaluation of the Indian Legal Framework

The statutory laws pertaining to copyright exhaustion in India appear to be very complicated in light of the growing trend toward digital revolution. While the Copyright Act of 1957 provides an implicit recognition of copyright exhaustion in India, there remain a number of ambiguities surrounding the extent of such a concept. This paper intends to explore the statutory laws and relevant precedents pertaining to copyright exhaustion in India and to identify the strengths and weaknesses of the laws on the issue. First and foremost, it needs to be pointed out that there exist no specific provisions addressing the issue of copyright exhaustion in India. In accordance with Section 14 of the Copyright Act, copyright exhaustion exists in India implicitly since copyright protection includes rights pertaining to reproduction of works and distribution of copies of works that are not copies already in circulation. However, the fact is that such an indirect inclusion of the concept appears inadequate when compared to the situation in the USA, where copyright exhaustion is explicitly stated in the relevant provisions. Some of the ambiguities associated with the lack of a statutory definition of exhaustion arise out of the applicability aspect. It means that it cannot be determined whether this doctrine can be applied to all forms of intellectual property or whether some may demand a different method to protect their owners, for instance, cinematograph films or sound recordings. Additionally, there are no indications from the statute regarding applicability of exhaustion to the digital context. However, judicial pronouncements played an important role in shaping the concept of exhaustion in India. One of the first cases where this concept of exhaustion was interpreted occurred in the *Penguin Books Ltd. v. India Book Distributors* case. The doctrine of exhaustion was interpreted narrowly particularly with respect to importation. According to the decision rendered in this case, unauthorized importation constitutes violation, thereby giving owners more protection over their properties. However, subsequent events show a tendency towards a more balanced position. Courts had to deal with the issue of what constitutes exhaustion and adopted interpretations which restricted its use. Nevertheless, further judicial and academic interpretation shows that the amendments made to the Copyright

Act may give rise to a much broader concept of exhaustion, thus enabling parallel imports of lawfully sold articles. However, despite this development in copyright law, there remains no clear doctrine of exhaustion as formulated by the Indian judiciary. Inconsistencies have emerged in case law in relation to the exhaustion doctrine, especially since different interpretations are adopted in different categories of cases. This gets complicated in case of digital items. Courts in India have mostly been conservative when applying the doctrine of digital exhaustion by stressing upon the importance of reproduction and communication. For instance, while delivering its verdict in *Super Cassettes Industries Ltd. v. Myspace Inc.*, the Delhi High Court pointed out that in digital dissemination, there are two activities: reproduction and communication to the public. Since both the activities are subject to control of the copyright holder, the application of doctrine of exhaustion is not possible. In a similar vein, while deciding the matter of *Tips Industries Ltd. v. Wynk Music Ltd.*, the Bombay High Court observed that downloads of digital music amount to reproduction. Thus, digital music has been excluded from the ambit of the doctrine of exhaustion because of the difference between physical and digital copies. In this regard, there have been various judicial rulings that support the trend towards placing the rights of copyright owners above all else within India's copyright laws in the digital era. It is true that such an approach is in sync with international practices, but what cannot be ignored is the balance needed between the rights of consumers and copyright owners. Since the principle of exhaustion does not exist, the consumers do not have the power to transfer and sell the licensed material. There has also been an increasing inclination among Indian lawmakers to license digital content. Digital content can be transferred through licensing contracts that limit the use, transfer, and reproduction of the digital materials. In the process, the user becomes a licensee as opposed to an owner of the material, and consequently, it is not possible to apply the doctrine of exhaustion. Nevertheless, the use of the exhaustion of rights doctrine is faced with obstacles due to the licensing system introduced in order to regulate consumers' rights and duties regarding copyrighted materials. The issue here is consumers' ignorance concerning their rights and duties associated with digital products, assuming that once they purchase the products, they automatically receive the same rights as they would for a physical product. Furthermore, it is necessary to acknowledge that technological protection measures also become relevant when dealing with the exhaustion of rights doctrine in India. As stated above, technological protection measures include, for instance, Digital Rights Management (DRM), aimed at controlling access to digital information and preventing copying. Though they become relevant in relation to this matter, they can also complicate the exhaustion of rights doctrine. Territoriality and international sales should be

considered when implementing the exhaustion of rights doctrine in India. This is because digital content is accessible from any point in the world; thus, national exhaustion does not apply to this case. On the other hand, it is unclear whether international exhaustion is applicable, as some claim that international exhaustion exists in India. As far as the policy implications of the Indian legal regime of digital copyright are concerned, there is an apparent dilemma between two equally important needs: protection of copyright owners' rights and promotion of access to knowledge, cultural works. Although copyright law should aim to provide copyright owners with enough protection in order to ensure their incentives to engage in creative activities, too much control over works may limit access and affect the effectiveness of the markets. The idea of exhaustion used to be a good instrument in such situations; however, in the digital environment, its impact becomes less visible. One more problem associated with the Indian statutory regulation of digital copyright relates to lack of legislative adjustments towards development of the digital environment and changes in copyright transactions. While the changes have affected all aspects of the process, no amendments have been introduced, leaving everything to the discretion of judges when making their decisions. The assessment of the current legal regime of Indian digital copyright reveals that no policy strategy in regard to digital copyright has been developed yet. While there are many decisions concerning individual cases, no coherent policy has been formed yet. When compared to other regimes, the Indian regime seems to be quite underdeveloped when it comes to digital exhaustion. In the United States, even though the regime is conservative, it offers adequate guidance in terms of statute and in terms of judicial interpretations. On the other hand, although complicated, the EU regime has evolved into something that is quite intricate and allows digital exhaustion in certain situations. India does not seem to have any of the above. From a comparative perspective, this indicates the necessity for change in the Indian regime. The Indian regime has proved to be quite inadequate when it comes to addressing digital exhaustion issues. There needs to be a set of clear statutory provisions defining exhaustion and discussing digital exhaustion in particular. However, besides statutory changes, there is also a requirement for consistency in judicial decisions. Consistent judicial decisions are needed that take into consideration the rights of both the copyright owner as well as the user. Finally, the review highlights the need for consumer rights in the digital age. With the development of technology and the increasing practice of licensing, there is an imbalance favoring the copyright owner. Hence, changes in legislation are necessary to create an equal relationship and give the consumers some degree of rights on digital property. In conclusion, the present condition of copyright exhaustion laws in India is faced with a critical point in time. While it could have been adequate for physical

copies, it fails to provide a solution for emerging problems brought about by the Internet. Thus, the lack of consistency and flexibility makes it less effective. In conclusion, it is clear that changes in the law are inevitable. By making such changes, the law will be able to maintain consistency, flexibility, and coherence. Thus, India will have an up-to-date law that serves the interests of all parties involved.

6.4 Challenges in Applying Exhaustion to Digital Works

However, the application of the principle of exhaustion in respect of digital works raises the question that is possibly the most controversial and complicated in today's copyright law. Although, traditionally, the principle has been an efficient tool for the limitation of the distribution right in regard to tangible goods, the application of the principle to digital works poses substantial legal and technical difficulties, as well as questions of principle. This part discusses in detail the mentioned difficulties and explains why the established principles of exhaustion cannot be applied in the digital environment. The very first challenge associated with the application of the principle of exhaustion to digital works relates to the nature of digital technology. Contrary to tangible goods that are sold from one owner to another, digital works are reproduced. Thus, the act of transmission of a digital work from one computer to another results in creation of a new copy of the work, which usually does not lose its quality in the process. This separation between distribution and reproduction is key in comprehending the limitations of the doctrine in the digital era. The doctrine of exhaustion can only be applied to the distribution of copies and not the reproduction. For tangible products, the difference is clear-cut because there would be no creation of further copies when transferring the copy. In the digital world, however, both activities cannot be distinguished from each other. All transfers create reproductions; therefore, the application of the doctrine may result in reproducing copies, violating the right of reproduction. The problem of reproduction was clearly addressed in various judicial opinions. Courts have always stressed that all digital transactions are acts of reproduction, thus excluding the transactions from exhaustion. The second issue concerns the matter of perfect copying. While digital files can be reproduced in infinite numbers without any degradation in their quality, physical products degrade with time. Such a characteristic raises serious concerns about the economic basis of the theory of exhaustion. The principle of selling used products presupposes that the sale of a defective product will not affect the sale of new products. However, concerning digital products, the concept of "used file" implies that the used file is completely identical to the newly produced

one. It raises an issue of market substitution and its potential effects on the income of the author. Unlimited exhaustion in the digital domain presupposes massive resales of digital products, which will discourage consumers from purchasing new products. One of the related issues pertains to the difficulty of maintaining the existence of a single copy at a time. While in reality, the transfer of a copy necessarily means giving up possession of it, the problem with digital copies is that there may be no way of ensuring that the original copy has been deleted. Even when the technological measures have been taken to achieve the purpose of “controlled transfer,” the issue of copying can’t be fully excluded from consideration. This problem has found a resolution in some jurisdictions where conditions have been set as to the necessity of deleting the copy. Unfortunately, enforcement of these conditions can be very hard. The existence of licensing models poses another big problem when it comes to implementing the doctrine. Digital contents are usually licensed out in such a way that transfer, resale, and duplication are expressly prohibited in the licence agreement. Users are thus considered as licensees and not owners of digital contents. As such, they cannot fall under the purview of the doctrine. Under the above-mentioned contractual regime, copyright holders continue to enjoy full rights over digital contents after distribution to consumers. Copyrights owners achieve this through their contractual rights where they licence out digital contents to users instead of selling the same. The validity of licensing models has been repeatedly upheld by courts. Another serious concern relating to licensing model is the issue of consumer right to property. In most cases, consumers assume that the purchasing of digital contents should give them full right to use the same as they will like. On the other hand, this is never the case because of restrictive licensing agreements. TPMs and technologies for implementing DRM, however, make it more difficult to exercise exhaustion. The copyright holder has the option of controlling the use of digital content via TPMs and preventing unauthorized downloading or distribution of that content. Despite the crucial role played by TPMs in securing copyrights, their implementation may have certain undesirable effects, limiting exhaustion. In particular, TPMs, such as DRM, can prevent a person from moving his digital media from one device to another or transferring the media to someone else even if such action was not considered an infringement according to law. It seems that technological limitations override legal principles.

Yet another challenge related to the exhaustion principle relates to emerging access-based content consumption platforms. The introduction of streaming, subscription, and cloud-based systems makes exhaustion irrelevant because in such cases content is consumed but no copies are acquired. It is also worth mentioning that this change reflects a completely new way of

approaching the transaction related to copyrighted works. Users no longer buy the copies and own them, but receive temporary access to works depending on specific circumstances. It offers more freedom and possibilities to the owner but eliminates the necessity to apply traditional legal notions like exhaustion in copyright matters. The global aspect of the distribution via the Internet creates even more problems because it is possible to download a digital copy regardless of the border of the jurisdiction where this work was purchased. However, different countries have different ways to interpret the doctrine of exhaustion and it can create serious obstacles for cross-border transactions. For example, the purchase of a digital file in one country may mean that it cannot be used under exhaustion principles in another country because there is no harmonisation of this aspect of copyright in the international legal environment. Finally, one needs to take into account the problem associated with the "making available" right in digital copyright. The fact is that digital transmissions fall under the definition of communications to the public and exhaustion can only be applied to distribution of goods. Classification of digital communications within the framework of the making available right is indicative of the necessity to update copyright legislation in order to keep up with technological advancements. However, in addition to creating a legal framework, the issue gives rise to a legal vacuum since traditional doctrines like exhaustion can hardly be applied to such kinds of communication. Another problem is related to the enforcement process. If legal doctrines accepted digital exhaustion, the implementation of the said principles would be extremely challenging. It would be problematic to control compliance with such terms as the deletion of the copy of an original document or prohibition of duplication. In relation to policy, the above-stated issues highlight the problem that exists when the requirement to provide adequate protection to copyright owners competes with the objective of ensuring access and fostering innovation. Although the protection of the owner's intellectual property is necessary in order to encourage creation, any kind of excess will impede access and the growth of secondary markets. The doctrine of exhaustion has acted, thus far, as an effective way of finding a balance between these two conflicting objectives. Yet, the limitations of the doctrine in the digital world, as presented throughout this discussion, suggest important implications for its future and raise questions as to the possible reforms that might be required. In addition, this discussion underscores the importance of taking into consideration the consumers' rights in the digital world. The lack of digital exhaustion implies an inability on the side of consumers to control the usage of digital works; as a result, consumer rights differ from those related to physical products. In conclusion, the implementation of the concept of exhaustion of rights in the context of digital products is faced with several problems associated with the basic distinctions between tangible and

intangible goods. Problems like copying, perfect duplicability, licensing, technical control, and worldwide distribution are some of the most important barriers to the adaptation of the exhaustion doctrine. The above problems show that the concept of exhaustion is not suitable for the digital realm. The solution to such problems requires a reassessment of the exhaustion doctrine and the establishment of innovative strategies to solve these issues.

6.5 Comparative Insights from US and EU Jurisdictions

A comparative study of the US and EU in terms of the application of digital copyright exhaustion reveals some interesting aspects of how various legal systems handle the question of digital copyright exhaustion. Both these nations accept the doctrine of exhaustion in the case of tangible works but differ substantially with regard to how this doctrine applies in the case of digital products. This provides valuable insights into the problems faced by the copyright regime in adapting itself to technological advancements. Such an insight would be helpful in the Indian scenario. As per Section 109 of the Copyright Act, the first sale doctrine is incorporated in the US legislation. This section states that the owner of the copy may sell the same or transfer ownership thereof without seeking any consent from the copyright holder as long as the copy in question was lawfully produced. It must be noted, however, that this principle is applicable only to the act of distribution and not that of reproduction. On the other hand, the US courts have always had a very restrictive policy regarding digital exhaustion. For instance, in the case of *Capitol Records v. ReDigi*, it was held that any attempt to resale of digital music constitutes an act of reproduction, as opposed to distribution. Although the company tried to ensure deletion of the original after the transfer of the file, the court held that there is always creation of another copy, meaning that the First Sale Doctrine cannot apply in such circumstances. It must be noted that the restrictive nature of the digital exhaustion policy in the US is part of the overall copyright law regime in the country. The policy of the US tends to emphasize protection of the rights of copyright owners over their digital property, but in such a manner that denies consumers the opportunity to transfer or sell these works. Licensing is one of the major reasons behind the non-exhaustion of digital works. On the contrary, the European Union adopts a contrasting stance on the topic of digital exhaustion. From this perspective, EU law is characterized by a series of directives, which include the InfoSoc Directive and the Software Directive. While the InfoSoc Directive limits exhaustion to physical copies alone, the Software Directive opens the door to the application of the doctrine of exhaustion to digital items in certain cases. This strategy was applied in the *UsedSoft v Oracle*

ruling made by the Court of Justice of the European Union, which found exhaustion possible in software. The court found that the perpetual license of software amounted to the sale of goods, and therefore, exhaustion could be applied. Therefore, resale was possible, provided that the first copy was deleted. Nevertheless, the approach adopted by the EU is limited and conservative. The principle of exhaustion as applied in the case *UsedSoft* pertains exclusively to computer software and not to other digital content like music or movies. In addition, the obligation to delete the first copy poses a challenge when considering how to operationalize digital exhaustion. The above comparative analysis indicates that while the U.S. follows a conservative and restrictive principle, the EU tries its best to adopt the principle in a modified form suitable for the digital era. The two models differ greatly since they have been adopted from two different policy perspectives. These comparisons are very important for India. On one hand, the American model illustrates how significant it is to appreciate the concept of reproduction rights within digital transactions. On the other hand, the European model proves that it is possible to tweak the theory to suit particular circumstances. Yet both frameworks also reveal the drawbacks and problems associated with digital exhaustion. From this perspective, the comparative analysis implies that India needs to follow a moderate approach that would incorporate both positive and negative aspects of each system. This means that rather than choosing between two extremes, the country needs to come up with an intermediate solution.

6.6 Recommendations for Legal and Policy Reform in India

In view of the observations and analysis made above in this paper, it is necessary that major changes be introduced into the existing Indian legislation concerning the doctrine of exhaustion of copyrights in the age of digital dissemination of goods and services. At present, the ambiguity associated with the Indian legislation, as well as the dependence upon judicial interpretation, makes it impossible to adequately cope with technological challenges. First of all, there is a necessity for statutory recognition of the principle of exhaustion of copyright and an explicit definition of the concept. In this regard, there should be a differentiation made between tangible and intangible works. Moreover, the Indian laws should recognize the difference between ownership and licensing. There should be no possibility of misusing licensing contracts, which limit the use of user rights. Where transaction has a nature of sale, users should possess property-like rights. Finally, India should introduce a limited version of digital exhaustion of copyright, especially where the transaction has a similar nature to that of a traditional purchase. Fourth, there is a need for regulation of technological protection

measures (TPMs). While it is important to have the use of DRM technology for protecting copyright, this should not result in a situation where users' rights are undermined. Fifth, the reforms in the policy area should aim at safeguarding the interests of consumers in the digital world. Consumers cannot find themselves in a worse off situation than consumers of tangible goods. Fairness and reasonable rights must be protected. Finally, India must learn from both US and EU examples, and strike a balance in its copyright laws. It is true that adequate copyright protection is very important, but it is equally important to have access to knowledge as well as efficient markets. In conclusion, there is a great need for the reform of the doctrine of exhaustion in India. Such a move would go a long way in ensuring that the copyright law is effective in the digital age.

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