



European
University
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DEPARTMENT
OF LAW

Equal Treatment as a Principle to Guide the Regulation of Intangibly Transferred Content

A case study on e-books using the examples of
copyright exhaustion, reduced rates of VAT and fixed
book pricing

Emma Linklater

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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SUMMARY

Using e-books as a case study, this thesis considers whether the principle of equal treatment could play a role in driving more consistent and rational regulation of markets where content is available in both tangible and intangible formats. At present, although the content is the same, these formats are often subject to different rules. This difference in treatment has opened up discussions about whether current legal frameworks should be amended and in these discussions actors with very different standpoints have consistently invoked the language of equality to justify their varied stances. However, in these discussions there is no clear elaboration of what equality means or how it can be used, leading to abstract debates and eventually to arbitrary decisions.

The thesis attempts to fill this gap by building a framework based on outcome equality to decide if intangible book formats should be treated 'like' tangible ones. It uses the objective underlying the existing rule as the standard for establishing likeness or difference and advocates that functional equality, rather than formal equality, is desirable because this takes account of the differences in the functionalities between content formats: Intangibility impacts on the functioning of the rule in question (e.g. quantitatively increased ease of circulation and copying) and it is only if these impacts can be neutralized that functional equality can be achieved.

The framework is applied to the case studies of copyright exhaustion, reduced rates of VAT and fixed book pricing. These have been chosen in recognition of the range of decision-making powers between the national and EU levels in this cultural sector. Overall, the analysis shows that rationality can be inserted by using equal treatment as a guide, but that consistency is more difficult to achieve given the interaction between national and EU influences in the book market.

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LIST OF ABBREVIATIONS

CESL – Common European Sales Law

CD – Copyright Directive 2001/29/EC

CJEU – Court of Justice of the European Union

COD – Country of Destination

CPD – Computer Programs Directive

DRM – Digital Rights Management

EBF – European Booksellers Foundation

EBLIDA – European Bureau of Library Information and Documentation Associations

EC – European Commission

EP – European Parliament

FBP – Fixed Book Pricing

FEP – Federation of European Publishers

GC – General Court

MEEQR – Measure Equivalent in Effect to a Quantitative Restriction

MS – Member State(s)

OECD – Organisation for Economic Cooperation and Development

POS – Place of Supply

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

TPM – Technological Protection Measure(s)

VAT – Value Added Taxation

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CHAPTER I: INTRODUCTION

ARE E-BOOKS BOOKS?

When it comes to the treatment of e-books from a regulatory perspective there seems to be ‘une certaine schizophrénie’.¹ Technology has progressed so as to allow the same creative content to be accessed in different forms and on different mediums, creating hybrid tangible-intangible marketplaces with both physical and e-books as outputs. However, the connection between the existing physical book rules and those that should apply to the regulation of this latest incarnation of book content is unclear. As things stand, the traditional physical book rules are being applied to e-books in some situations, while in others they are not. This observation raises questions about the place of the principle of equal treatment in driving the regulation of the market for e-books.

From an industry perspective, examples of contradictory stances are in plentiful supply and are understandable given motivations of profit maximisation (even if assertions are made to the contrary). Publishers argue, using a rhetoric of equality, that e-books are like goods so that they should benefit from a reduced VAT rate; at the same time they argue that they are ‘differents’ and should be treated as services so that they are not subject to the doctrine of exhaustion, thereby permitting the development of an aftermarket in competition with profits of their own. Of much greater concern is the inconsistent treatment of e-books in regulation itself. Certain existing legal frameworks at the EU level – such as the current VAT and exhaustion rules – require unequal treatment of physically embodied and intangible content, even where that content is identical. This may be because of an active choice of the legislature to treat the two formats differently, or it may be the result of an outdating of the written law due to technological developments.

Amongst legislators at the national level, we also find an erratic rhetoric between different areas of law and between the policy choices made by the MS where these are not bound by the EU framework. Here, the major example is fixed book pricing where some decision-makers, for example the French, German and Austrian governments, advocate that there is a real *need* for equality between books and e-books while in the Netherlands instead it was felt that the differences between the two warranted differentiated treatment. Without any real explanations, divergent policy stances and regulatory decisions are being taken about how we treat this new way of transferring book content.

¹ Actuallité (2013), ‘Digital Census : "une Certaine Schizophrénie" Dans L'industrie du Livre’,

Practically, the inconsistencies leave us in a quandary: we are given the distinct impression that regulatory choices concerning e-books are rather more schizophrenic than structured, and this malaise comes with the result that the very effects equality as a principle should be able to produce – rationality, consistency, predictability – are not realised. If no real thought is given to this principle when decisions are being made that affect the marketplace, making a connection between physical and intangible content – or choosing not to do so – risks being an arbitrary and policy-oriented choice rather than a principled one. This work tries to add clarity to the current situation by understanding why legislative frameworks appear as they are, and proposes that by taking heed of the principle of equal treatment a more consistent route can be carved out for treating further technological developments.

I. THE STARTING POINT

The research question arises on a very elementary level because of the often too self-evident connection made between physical books and e-books based on their content: Most might not hesitate to agree with the statement that ‘A book is a book regardless of its format’.² More concretely, it arises from two observations that it takes as its starting points:

Firstly, there is a perceptible ‘rhetoric of equality’ surrounding the question of how we deal with intangible content that is comparable to physically embodied content.

Secondly, legislators when faced with changes in technology have to work out a way to deal with these in law. There may be a preference to align the treatment of new technologies with existing rules, to avoid normative confusion and preserve existing norms, or they may make the decision that the new situation is so different that it warrants distinctive treatment. In order to understand the research question, each of these observations will be examined in turn.

1. *A perceptible ‘rhetoric of equality’*

The fact that e-books contain print book content replicated in digital form has tempted many into using a ‘rhetoric of equality’ when discussing the two. This rhetoric appears at a policy level, and several examples of this ‘equality-talk’ can be observed, although these

² European Booksellers Federation (EBF), European Writers' Council (EWC) *et al.*, ‘Manifesto for the 2014 European Elections’, Brussels, at Priority 2. <<http://www.fep-fee.eu/IMG/pdf/ebffepewcmanifesto-3.pdf>>, accessed 02.10.2014. See also the recently launched #unlibroeunlibro campaign by the Italian Publishers Association supported by the Minister of Culture.

are by no means all on the same terms. If we look to Neelie Kroes speaking in 2013 as Vice-President of the European Commission responsible for the Digital Agenda, we see that she is openly using the language of equality in the context of reduced VAT rates to underline a policy stance in this area, even where the legislation differs³:

“[The] intention is for the subsequent system to align VAT rates applied to print books and e-books. [...] After all, it is common sense that the same rules should apply to same products. I support such a consistent, non-discriminatory tax regime for paper and e-publications; so does the OECD; I hope you will too.”

Concerning the discussions surrounding the question of digital exhaustion, the Commission’s summary of the 2013 Copyright Review responses relating to ‘download-to-own’ content indicate that arguments about ‘equality’ are being submitted to try and shape the future of the regulatory environment.⁴ For example, the Summary notes that ‘end users/consumers argue that the current legal situation results in an unequal treatment of physical and digital formats’ and that they consider ‘printed books and eBooks should be treated in the same way.’⁵ Institutional users note that ‘digital content is often sold at the same price as the physical equivalent and therefore that buyers should have the same rights’.⁶ Combined with the Court of Justice of the European Union (CJEU)’s reference to interpreting Article 4(2) of the Computer Programs Directive (CPD)⁷ that deals with the question of exhaustion ‘in the light of the principle of equal treatment’⁸, there is a strong sense that equality is something that could guide us through this murky and highly politicized landscape. Similarly, at the national level, France again and Germany for example, have seen fit to extend their fixed book pricing (FBP) laws to e-books also, on the basis that the same cultural content is contained in each, and is therefore equally worthy of protection.

In this same vein, the ‘rhetoric of equality’ can also be observed even where equal treatment is denied. This is because, as a principle, equal treatment also has a negative importance: It means that ‘likes’ should be treated alike, but also that ‘differents’ should be treated differently. In this negative sense of difference we see arguments that e-books can be copied and shared with greater ease than print books, or that they are available

³ The legislative framework is discussed in Chapter 4, section II.I and Chapter 6.

⁴ European Commission (2014), ‘Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules’, Directorate General Internal Market and Services Directorate D – Intellectual Property and DI – Copyright, Brussels, July 2014, pp. 20-22.

⁵ Ibid, p. 20.

⁶ Ibid, p. 21.

⁷ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs (‘CPD (2009)’) OJ L111/16 of 05.05.2009.

⁸ Case C-128/11 *Usedsoft GmbH v Oracle International Corp.* [2012] ECLI:EU:C:2012:407, judgment of 03.06.2012, [61].

any time, anywhere and for access by anyone.⁹ The Netherlands for example chose in 2011, not to extend its FBP law to e-books because of numerous differences between the situation for e- and p-books in terms of business models, functionalities and their vulnerability to be caught under the EU free movement rules.¹⁰ Also, it can be noted that contradicting the responses to the Copyright Review noted above, authors and performers responding to the same consultation felt that the ‘traditional concept of ownership which applies to physical goods should not be applied to digital content as the two are not comparable.’¹¹

At present, findings of ‘difference’ drive regulation in some contexts¹², while in others findings of ‘likeness’ prevail¹³. This raises the question: How can all these actors, in all these areas of law, purport to be guided by equal treatment in some way and yet come to such different conclusions about the connection between print and e-books?

And even with so much talk, it is still hard to get around the fact that treating e-books like print books often goes against important existing legal frameworks which differentiate between tangibles and intangibles: e-books are not subject to exhaustion or reduced rates of VAT, and there is no ‘right to e-lend’. Even if our legal frameworks may not be ideal, the indeterminate manner in which these references to equality are made – without any real consideration of what aspects it is that count for deciding if there is ‘likeness’ or ‘difference’ – means that such debates are likewise unsuited, although for reasons of legal certainty.

Without any clear direction as to the standard upon which we judge e-books to be ‘like’ print books and thereby leading to their equal treatment, the door is left open for policy oriented, arbitrary decisions or ‘schizophrenic’ stances. With no real consideration of what standard is relevant and what is not, we risk schisms appearing in the treatment of e-books based on haphazard guesses at what the standard should be. If shared content is

⁹ Although these differences are notable and cannot be swept aside, they do not necessarily be little the use of existing rules as the starting point for regulatory decision making or mean that the rules applied should in fact be different. This is explained in Chapter 3, Section IV.

¹⁰ See in particular Section 2.3 of the ‘Digitally Binding’ Report: J Poort, I Akker *et al.*, ‘Digitally Binding: Examining the Feasibility of Charging a Fixed Price for E-Books’, March 2012, Report commissioned by the Ministry of Education, Culture and Science (OC&W), Amsterdam.
<http://www.ivir.nl/publications/vaneijk/Digitally_binding.pdf>.

¹¹ EC - Report on the Responses to the Public Consultation on the Review of EU Copyright Rules (2014).

¹² E-books are not capable of benefitting from reduced rates of VAT under the VAT Directive, while print books are; E-books are seemingly not subject to exhaustion under the CD, while print books are; In the Netherlands, e-books are not subject to the FBP law, while print books are

¹³ e.g. France and Luxembourg have contested the EU VAT framework and applied the principle of neutrality (as they perceive it) so that print and e-books to benefit from reduced VAT rates; France, Germany, Austria (...) apply FBP to both print and e-books; UK (...) does not apply FBP to print or e-books.

one plausible standard for determining likeness, so might physicality, portability, smell, or the use of printers ink be.

2. *A choice between applying existing rules or new rules*

Next, the observation can be made that for regulators it is preferable to use existing rules rather than create new ones. This preference for extending existing rules to new technologies has been widely noted in academic debates regarding the regulation of new technologies.¹⁴ This strategy is generally preferable for regulators because it favours incremental rather than radical change, and allows for the location of solutions which fit with regulatory traditions and existing norms. It can also reduce confusion about the rules that apply for both consumers and addressees.

If we consider why regulators might prefer existing rules in the e-book context, it is not hard to see that e-books have not been born into a regulatory vacuum: their content is the same as print books and – given the cultural importance of books – it is likely that this content is the subject of regulation rather than the physical embodiment of the book. If this is the case, then there is reason to apply existing frameworks because the objectives of these should not lose their value in the new context where only the vessel, not the content has changed.

However, there is also a risk with this approach, which comes from the fact that simply applying the same rules to new technologies as existed in the traditional situation may not necessarily produce the same results. Technologies have certain impacts, and these impacts affect the way rules function. However these impacts are not necessarily a reason to create a wholly different rule; for example, although digitisation qualitatively and quantitatively alters the possibilities for copying and risks increasing piracy, blocking all copying (which would be a ‘new’ rule) is not necessarily the correct solution. The justifications for allowing *limited* copying likely still exist, so the existing rule does still have a place; rather than breaking from that rule altogether it may be more appropriate to rather alter the functioning of it in order to take account of the impacts of this new technology.

At the EU level, we can observe various situations in which the (projected) impacts of technology have been used to justify the application of a completely different rule for e-books than that which applies to print books. In many of the situations where

¹⁴ B-J Koops, M Lips *et al.* (ed), *Starting Points for ICT Regulation : Deconstructing Prevalent Policy One-Liners* (IT&Law Series Vol. 9, The Hague: TMC Asser Press, 2006); L Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books 1999); L Lessig, *Code Version 2.0* (New York Basic Books 2006); C Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010) 18 (3) *International Journal of Law and Information Technology* 248. ; C Reed, *Making Laws for Cyberspace* (Oxford: Oxford University Press 2012).

contradictory approaches have appeared between MS or where MS have developed rules in conflict with the EU framework, this is because lines are drawn on the matter: one side sees a need for new and distinguishable rules for intangibles (as compared to tangible) books because they are ‘different’, while the other sees the existing rules are retaining relevance even if their function may need to be adapted. Here the difference is in outcomes: The former sees a need for a different outcome, while the latter believes the traditional result holds true.

II. THE THESIS

The above two observations – that ‘equality talk’ is rife and that there is an active choice to be made to either break or ‘reuse’ old rules – warrant further analysis. The thesis takes these two observations and transforms them into the research question: ‘Is equality a principle to drive the regulation of the market for e-books?’ The projection is that when regulators must choose between applying old rules or creating new ones, equal treatment is a principle has a role to play in guiding this choice to produce more rational and consistent results.

The value of equality as a principle of good law-making cannot be doubted, it having ‘perhaps greater resonance than any other legal concept.’¹⁵ However equality is not really a term that has entered into common usage in the area of technology regulation, even if the rhetoric is there: While it is clear that equal treatment has a significant role to play in social law – sex, age, and race discrimination – can we really talk about equality between books and e-books? This thesis aims to connect the principle to the rhetoric by drawing upon the importance of equality in economic law, which lies in its nature as a legal concept: Equality acts as a guarantee of consistency, fuelling rational law-making. It requires that likes be treated alike and differentials differently, unless objectively justified. However, to be useful, equality needs to be applied in a consistent way. If the schizophrenic ‘rhetoric of equality’ we see emerging continues to predominate this is really no application of the principle at all; instead we are seeing multi-fold policy and stakeholder concoctions designed to promote often diverging interests. In order to be useful, we need to assign equality a standard on which we are to judge the ‘likeness’ or ‘difference’ between tangible and intangible books. It is on the basis of this standard that the application or non-application of the print law is decided

This thesis outlines an analytical framework with a set standard for equality to apply, and then tests whether this framework for equal treatment can be used as a decisional guide.

¹⁵ T Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press 2006), p. 59.

If the result is outcomes that are more rational and consistent than the current state of affairs, then equality can indeed be a useful principle to drive the market.

The alternative options to this approach are threefold: Things could be left as they are, with the continuing disorder of the ‘equality rhetoric’ but with no clear rationalisation of what this means; or a strict approach could be taken whereby e-books are *always* treated as printed books, or they are *always* treated differently from printed books. Such a strict approach is not thought to be appropriate in the law-making context because more differentiation is considered both necessary and proper for building well-adapted rules.¹⁶

The thesis addresses the research question in two parts, as summarised below. Part I consists of Chapters 2, 3 and 4 and sets out the framework for analysis. In Part II, the framework for equal treatment is tested to see how it would look in three different case studies on copyright exhaustion, reduced rates of VAT and fixed pricing, detailed in Chapters 5, 6, and 7. The conclusions drawn from the analysis are summarised in Chapter 8.

Chapter 2 of this work looks to examine in greater detail what exactly an e-book is and how they may differ from print books. It highlights that the term ‘e-book’ in fact refers to intangible book content available via many different access models and that not all these models are comparable to print books. There is in fact a spectrum of likeness, with the download-to-‘own’ model being closest to print books. It is this model that most regulators have in mind when using their rhetoric of equality and as such this is the focus of the rest of the work. However, although download-to-own models may in some sense be close to sales of print books and the content may be identical, this does not mean they function in the same way. Technology brings certain impacts, examined in this chapter, which are important to understand because these affect whether simply applying the same rules will actually achieve neutral outcomes between print and e-books.

Chapter 3 then builds the framework for our equal treatment analysis by choosing the standard that we should use when deciding whether and intangible books are ‘alike’, thereby necessitating equal treatment. It proposes using the objective of the existing rule as this standard, drawing upon academic literature on the regulation of new technologies to reach this conclusion. It considers that that since the intellectual content of books rather than their format distinguishes them from other marketable goods or services, a broader approach than dividing tangibles from intangibles as appears in the EU legislation is necessary. Also unsuited is the consumer use perspective

¹⁶ ‘Der Umwelt gerecht werden’; see G Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 *Modern Law Review* 1.

preferred by the CJEU in fiscal neutrality case law, which is too narrow and exclusionary an approach to be applied in a regulatory context.

This Chapter also elaborates how the analytical framework for a rule-objective approach would look. This means the objective of the rule and its capacity for translation into the new environment is used as the standard for deciding if equal treatment should apply. An important point of clarification is that if equal treatment is applied, this does not necessarily mean the same rules must be applied in the same way as for tangible books. Simply applying the same rules would not necessarily mean the same outcome is attained, because technology brings impacts – such as increased ease of copying or cross border circulation for example – e-books may function differently when a rule is applied. Where this is the case, these impacts might be capable of being neutralised so as to achieve outcome equality.

Chapter 4 approaches the question of how EU law and national cultural policies interact. This Chapter is essential because it underlines that the national discretion as regards cultural policy decisions must be respected; as such, this thesis at no point attempts to undermine that policy choice for print books. It does however demonstrate a real difficulty with any research on the regulation of the publishing industry lies in the dual cultural and economic nature of books; the lack of harmonisation of cultural policy within the EU means their regulation is always going to be based on policy choices that vary between States. Although this thesis does not question the choice of MS A to apply FBP for example, while MS B does not, it does present an analytical framework that means where MS A chooses to apply FBP to print books and the objectives of this rule translate into the e-book environment, MS A should also apply FBP to e-books. As such, although this thesis does not advocate harmonisation of cultural policies between MS, it does aim to provide rationality in the application of those policies to physical and intangible book content.

With a framework to apply, **Part II** of the thesis then seeks to apply this with respect to the three case studies of VAT, exhaustion and FBP (**Chapters 5, 6 and 7**). For each case study it asks:

- What is the rule that we are talking about and what is the legal framework under which the rule operates?
- What is the objective of this rule/what is the intended result?
- Does the objective of the rule translate for e-books? (i.e. is intended result still a valid concern?)

- Should the rule extend to e-books under equal treatment analysis (this answer should be yes if the objectives translate, or no if they do not)
- If the objectives translate, is the way the rule functions in the e-book environment affected by the functionalities of e-books? Can these impacts be 'neutralised' to achieve outcome equality or are there any problems with this?

Finally, Chapter 8 compiles the conclusions from the study.

III. CHOICE OF CASE STUDIES

This work is necessarily multi-layered, on the one hand due to the vastness of legal areas that e-books (and print books) touch upon and on the other hand because of the interaction between the EU and national levels. The purpose of this work is not to provide answers for all regulatory questions the book market is going to face, but rather to highlight what seem to be the most important ones and to set out the role equal treatment as a principle could play in the decision-making process. As such, it has been necessary to be selective as to the choice of case studies; for example, e-lending was considered an appropriate case study in order to test the equal treatment framework, but was excluded because the core issue is so closely interlinked with the exhaustion issue (lending being dependent on the exhaustion of the distribution right).

A central factor influencing the choice VAT and exhaustion in particular was a three-month period spent in Brussels working with the Federation of European Publishers (FEP) as part of the research for this thesis. The many encounters with questions of importance to the sector indicated that these case study areas were not only the current 'hot topics' of Brussels debates, but that this was because they raised important economic concerns for market participants as well as the MS.

Regarding the exhaustion issue, for publishers the strong feeling was that the creation of a secondary market for e-books could have consequences far greater than in the physical book context because 'resold' e-books are a perfect copy of the originally acquired version; they do not tear, tatter or otherwise diminish in quality with use (or, at least do so minimally). To enable a digital resale market would be to enable a market in perfect competition with the first sale one, and this could also mean a reduction in author (and publisher) remuneration because under the status quo all (legally) sold e-books are sold through the first sale channel entailing a royalty payment (royalties would not be paid out if the works were to be bought on the secondary market). Further concerns regarding price competition between first and second sale channels and the erosion effect this could have on margins were also voiced in defence of the status quo, although

it must be qualified that these concerns could only arise where fixed e-book pricing is not in place.

Regards VAT, reduced rates could alter the end price for e-books considerably, and particularly while at the FEP in 2013, the place of supply (POS) framework then in place was strongly felt to encourage forum shopping. This framework has now changed so that VAT is paid in the country of destination (i.e. where the consumer is based), but the VAT issue remains relevant. This is firstly because the current EU framework enforces a distinction between books and e-books that is objected to strongly by certain MS (firstly France and Luxembourg, and now Malta and Italy), so much so that they actively chose to overlook the EU law in full knowledge of the consequences infringement actions against them could have. Secondly, an aspect that this thesis largely leaves open is that the VAT issue raises direct and difficult to answer questions for MS at the policy level: Is the desire to encourage cultural uptake stronger than the desire to retain as much government revenue as possible in the current economic climate?

FBP was added to these case studies as the elephant in the room. Although there is a lengthy and very useful accumulation of case law in the print context, the divisiveness of the questions FBP raises from a market perspective (i.e. does it actually work?), but also an internal market perspective (i.e. how far can we push national cultural policies before they cross the line and conflict with European economic market integration goals?) make it an interesting study of national level approaches.

My time at the FEP reinforced the feeling that the industry is afraid of many of the changes that are happening, and often perplexed about where the next technology update could lead their content. Throughout my research for this work, I have grown to sense an easy criticism that could be made by those sitting opposite publishers at the policy making table; insofar as they are arguing for equalised treatment of physical books and e-books in some contexts (e.g. VAT) but pleading the opposite for other areas (e.g. exhaustion) it sounds very much like they are trying to have their cake and eat it. This is not necessarily a position to be criticised – they are, after all, in business – but nonetheless such contradictions could undermine their credibility (and genuine concerns) when it came to convincing policy makers, especially in Brussels, about the best way forward. Part of the aim of this work was therefore to provide a more rational outlook through outcome equality to assist in framing the policy decisions to be made: If I could show that equality could provide a sensible and balanced outcome that ensures industry interests are balanced against societal ones in the same way as is currently being done for print books, I could also show that such contradictory stances are both

irrational and unnecessary, and that change is not necessarily to be feared in the longer term.

Although their diversity may be subject to criticism, it is felt that these case studies capture essence of the publishing sector, reflecting market issues relating to competition, copyright and specific cultural policies that are applied to books. The choice of case studies enables the spectrum of competence allocations to be examined: Regards exhaustion, case law then a combination of the Copyright Directive and further case law served remove any real MS discretion; regards reduced VAT, MS are enabled by the VAT Directive to make a policy choice within the limits set out by the same Directive; for FBP, the MS retain their cultural policy competences, clipped only (and rather leniently) by interference where these inhibit internal market aims. As such, the coverage aims ensure that the interaction between national and EU law is highlighted sufficiently, emphasising that the development of this market (as with the book market) will not come singularly from either level.

IV. POTENTIAL POINTS OF CRITICISM

I. Using of equal treatment as the starting point and focus

The core focus of this work on the utility of equal treatment to solve regulatory questions may be a point of criticism because, at first sight, it seems to ignore other paths. This criticism, while seeming logical at first, is in fact countered by the two-sided nature of equal treatment. Equal treatment means not only that likes should be treated alike, but also that differentials should be treated differently. If it is found that the standard for equal treatment (whatever that may be) is not met then this also tells us something: that books and e-books should *not* be treated the same.

A further criticism may be found in the equal treatment framework set out in Chapter 4 relating to the choice of the rule-objective as the standard for judging equality. In this respect, it can be noted that the choice of a standard, whatever it may be, is always going to be a matter of judgment¹⁷. What this work does is suggest that looking at whether the objective of the print rule translates into the new regulatory context is a plausible way of determining likeness without getting tied down in the technology related features of e-books and print books. It uses this standard for the framework, but the selection of this one standard is not the bottom line. Rather, it might well be concluded that a different

¹⁷ “The point is that even if the line being drawn between cases is, in a significant sense, arbitrary, it is being drawn in a systematic way, rather than leaving arguable cases to be decided on an ad hoc basis by individual courts.” See G Lamond, ‘Analogical Reasoning in the Common Law’ (2014) 34 (3) Oxford Journal of Legal Studies 567, p. 576.

point of comparison would better, but this would not necessarily undermine the point of this work that is that equal treatment is a principle to drive the market.

2. *Writing about national cultural policy decisions*

Chapter 2 of this thesis attempts to address the cultural aspect of books specifically and the effect this has on the regulatory decisions being made. It reinforces that this thesis is *not* written in a harmonisation vein and is not intended as a critique of national policy choices in the policy sphere. Instead, by using the rules as applied to print books as a starting point, it attempts to determine whether these rules can – and should – be translated into the e-book context.

3. *The difficulty of studying a market in flux*

The greatest practical difficulty with this work is that the sector is a moving target, which is constantly in a state of flux. The first problem is therefore in defining what we mean by ‘e-books’ and to what extent they are like print books. This is attempted in Chapter 2 and the work focuses on ‘download-to-own’ content, sold under ‘licences’ for perpetual use at a price similar to that for print books; this means we are looking at the majority of e-book ‘sales’ of Amazon, Apple, Waterstones, etc. The focus is not on ‘streaming’ or subscription models for e-books, which do exist but at the present time nascent. The perpetuity and intention to reimburse the author are important factors because it is on this basis that the logic of the Court in *UsedSoft* can be cross-applied; with these factors we are not looking at licences, but sales. In short, this download-to-own model is the closest to transactions covering print books. The problem is that if download-to-own content is subject to the same outcome as print books, and this is not to the liking of those controlling the business offer, in the digital environment it is easy to change to, e.g. subscription or streaming services instead. If the framework is perceived to work ‘against’ the interests of certain market players, this creates an incentive to re-think business models so that they can function under the most favourable conditions. This possibility is something to be aware of, but it does not undermine the application of the equality framework per se.

4. *The choice of publishing sector and relevance for other content industries*

The e-book market has been chosen firstly because, unlike music or film, the emergence of books in intangible, downloadable form, has been a relatively recent market phenomenon. As such, regulation and case law in this area is either inexistent (often meaning the offline law is simply applied by analogy) or is lagging behind the current state of industry and the expectations of consumers. A second reason for this choice is the recognised cultural function of the book: That books bring societal value and that having access to books is in the general interest is acknowledged throughout the EU MS

and beyond. This recognition is prominent in regulatory decisions affecting the book sector in a way that does not exist for other content industries such as film or music for example, where their cultural value is acknowledged through subsidies rather than special rules affecting the sectors. This added dimension provides for a more interesting basis for study, since the cultural interest is generally of a national nature. Painting this onto the overarching canvas of EU law, we can reveal tensions in the book sector and analyse the extent to which these may – or may not – be transferred into the e-book age.

PART I:

BUILDING THE ANALYTICAL FRAMEWORK

CHAPTER 2: WHAT IS AN E-BOOK?

INTRODUCTION

It would be wrong if this thesis were to give the impression that the advent of the e-book was a revolutionary occurrence; rather, as Section I of this Chapter points out, it is more appropriate to place the e-book within the evolution of book content distribution, from offline to online sales of goods and then towards the provision of intangible ‘services’ using a variety of access models. The development of the e-book is part of a chain of digitisation that can be seen to have taken place in all content and creative industries, not publishing alone. However, the recognition of this as an evolution serves also to highlight the disjuncture in some regulatory approaches that treat e-books as ‘different’ based on the fact of their immateriality and classification as a non-good: Since the content remains the same, should e-books not be considered first and foremost under the heading ‘books’?

A problem with defining e-books in law is that ‘e-books’ do not all fall into one category. Although they all contain book content in a digital form, some behave in a more ‘book-like’ manner than others as a consequence of the access model applied to them. The different ways digital book content can be accessed and read are discussed in Section II; the same e-book title may be available to download, to stream, or to loan. The point of importance here is that the access option chosen determines what one can *do* with that e-book. This point is followed by a description in Section III of the different features of the e-book market, which includes access to software and hardware and at any time, anywhere.

This chapter also considers in Section IV how e-books and print books are distinguished from print books by legal categorisations, both at the EU level (noting the goods and services distinction) and at the national level. Some national VAT and FBP rules refine their scope with reference to physical features (such as printed ink and paper pages), meaning they cannot apply to e-books while others are broader in nature, referring simply to ‘books’ or – where recent amendments have been made – including specific categories of e-book or audio book content also. This diversity, in conjunction with the preceding section, serves to highlight the vastly increased number of variables when deciding how to treat the broad variety of formats and functionalities that e-books might include.

I. FROM P-BOOKS TO E-BOOKS

According to its dictionary meaning, an e-book is '[a]n electronic version of a printed book which can be read on a computer or a specifically designed handheld device.'¹⁸ This definition highlights the link between print books and e-books, but does not go so far as to determine the limits of this link.¹⁹

Book content has been traditionally accessed by readers through the tangible medium of the book, however technology has moved our world increasingly away from the analogue and towards the digital. 'Book content' can now be accessed in a tangible or digital form, in print books, on CD-ROMs or DVDs, as intangible downloadable files or even as steaming links on websites. Despite scare stories, book content currently retains both an analogue and digital existence and a life in the offline as well as the online.

Print books are always analogue, physical goods,²⁰ however they can be distributed either offline (in traditional bricks and mortar stores or through mail order catalogues) or online (via e-commerce). The Internet was embraced early on as a convenient method to distribute print books, as is well known from the rise of Amazon since 1994 as an online bookstore.²¹ Already in the late 1990s the effects of increasing online retail had started to change the structure of the book publishing industry. The 'Amazon effect' has been well documented,²² causing commentators to speculate that it has irrevocably altered the face bookselling and jeopardised the future of publishing industry. The major facilitator for Amazon's growth was the Internet and its long tail strategy,²³ utilising traditional wholesalers as well as its own warehouses to feed supplies of bestsellers soon turned it into a more efficient bookselling system than that of in-store orders and collections through networked distributors that had existed for so long under the traditional bricks and mortar model.

Although it was the downstream effects of the Internet that altered the face of the book market as a whole, new technologies and digitisation were also being readily embraced in the upstream by publishers so as to improve visuals and typesetting, as well as processes. Before the widespread acceptance of e-books, publishers were also exploring digital distribution possibilities for their content in audiobook form. Audiobook content

¹⁸ See <<http://www.oxforddictionaries.com/definition/english/e-book>> accessed 11.01.2014.

¹⁹ J Milliot (2013), 'Reinventing Book Printing toward a Hybrid Market' (Publishers Weekly blog), posted 18.01.2015. <<http://www.publishersweekly.com/pw/by-topic/industry-news/manufacturing/article/59191-reinventing-book-printing-toward-a-hybrid-market.html>> accessed 18.01.2015.

²⁰ See definitions in Section III of this Chapter.

²¹ For example: B Stone, *The Everything Store: Jeff Bezos and the Age of Amazon* (UK: Corgi 2014).

²² For example: G Packer (2014), 'Cheap Words', *The New Yorker*, published online 17.02.2014. <http://www.newyorker.com/reporting/2014/02/17/140217fa_fact_packer?currentPage=all>, accessed 08.04.2014; S Wasserman (2012), 'The Amazon Effect', *The Nation*, (18.06.2012 offline edition), published online 29.05.2012. <<http://www.thenation.com/article/168125/amazon-effect#>>, accessed 08.04.2014.

²³ C Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (New York: Hyperion 2006).

moved with relative ease from distribution on physical tapes and CDs (again distributed offline or online via e-commerce) to digital intangible files available via the Internet as MP3 player devices grew in popularity.²⁴ However, it was the lack of technical capacity that discouraged publishers from engaging in e-books early on: There was simply no readily available, convenient way to read e-books besides on computer screens, which were uncomfortable on the eyes and much less convenient than a print book.

Early attempts at dedicated devices did not take off and although ‘e-books’ were available from an early date – their ‘creation’ is largely dated as being in 1971 when Michael S Hart first typed the Declaration of Independence into a computer initiating his project Gutenberg – their use was not widespread.²⁵ Distribution was also a problem, in that pre-loading was necessary in some form and the need to store e-books on CDs created space issues in much the same way as print books.

It was thus in much the same way as Apple, though its iPod, helped to transform music from a physical-product based industry (CD, tapes, LPs) to an intangible industry, that external readers began to step in to produce dedicated e-reader hardware with transfers of content possible through direct downloads via the Internet. Sony was an early starter, with the Librie and Sony Reader (2004 and 2006 respectively), but large-scale success of such devices was not experienced until Amazon launched its Kindle in 2007. Other retailers followed suit: The Apple iPad launched in 2010, as did the Barnes and Noble Nook. Following the trend, most major media retailers as well as booksellers in Europe (and beyond) now market their own devices²⁶ or have contracted with hardware manufacturers to supply their devices in-store and via their websites.²⁷ By early 2012 in the UK, a third of the population had already got their hands on an e-reader²⁸, although such popularity is yet to be reached in other EU States: at the same point in time in Germany this figure sat at around 14%²⁹; in France the figure was only 3%.³⁰

²⁴ Audible.com, established in 1998, was the first website to offer downloadable digital audiobooks. <<http://www.audiopub.org/resources-industry-data.asp#07SS>>, accessed 12.01.2015.

²⁵ See Project Gutenberg (undated), ‘Michael S. Hart’, <https://www.gutenberg.org/wiki/Michael_S._Hart>, accessed 01.05.2015. Early dedicated readers include Sony’s ‘Data Discman’ (1992) which read books stored on physical CDs and the ‘Dynabook’ (1970s) created by PARC.

²⁶ For example Tesco in the UK has the Hudl (<<http://www.tesco.com/direct/hudl/>>, accessed 12.01.2015), while in Germany Thalia, Weltbild, Hugendubel and Club Bertelsmann have come together to produce the Tonilo (<<http://www.tonilo.de>>, accessed 12.01.2015)

²⁷ Virgin in France (before it filed for bankruptcy in January 2013) had deals with French manufacturer Bookeen for its Cybook Odyssey device, as well as with Amazon to distribute its Kindle Fire tablet. FNAC contracted with Kobo in 2011, online bookshop Chapitre with Sony from September 2012 to distribute its devices. For further examples see Ruediger Wischenbart Content and Consulting, ‘The Global Ebook Market: Current Conditions & Future Projections’, 10.2013, at p. 12. <www.global-ebook.com>.

²⁸ Ibid, p. 22.

²⁹ Ibid, p. 27.

³⁰ Ibid, p. 32.

As such, although the success of e-books was largely unpredicted, it would be incorrect to view the hybridisation of the marketplace from a physical goods-based to a physical *and* intangible one as anything other than the result of technological progression. With book content already in digital form in hands of publishers and authors, intangible distribution was a logical step forward, particularly with the examples of film and music leading the way. However that is not to say it was a coveted step forward: with the problems of copying, piracy and distribution in plain sight from the experiences of other content industries, it is not hard to understand why publishers would be cautious about this new medium. Be that caution as it may, the ‘publishing dinosaurs’³¹ have now for the large part embraced e-books to integrate them alongside their print book offers.

As Section II points out, this e-book offer is at once more varied because the number of access models has increased and more restricted than for print books due to the impacts of technology set out in Section III that industry actors, as well as regulators, have attempted to counter through technological protection measures, territoriality restrictions and proprietary systems. However, the content that makes up the intellectual work – the subject of copyright protection – which is contained in the pages of a book, the sound bytes of an audiobook or the pixels of an e-book remains the same. This is even so where the book content itself is surrounded by pictures, audio or film clips to form an ‘interactive’ e-book. This thesis leaves largely open the question of how to deal with convergence³², however for categorisation purposes it is very relevant and has caused some States to distinguish for the purpose of their rules facsimile e-books and those that contain multimedia editions as examined in Section IV of this Chapter.

II. ACCESS MODELS

The access models described in this section are noted by way of example of the wide variety of models available and are not intended to be exhaustive. Given the focus of this thesis, the models outlined focus on those available in the EU.

³¹ The Bookseller (2007), ‘Publishing Dinosaurs Rise’ (Bookseller News blog), posted 29.02.2007. <<http://www.thebookseller.com/news/publishing-dinosaurs-rise>> accessed 12.05.2015.

³² LC Sozio, ‘From Hardback to Software: How the Publishing Industry Is Coping with Convergence’ London School of Economics. <<http://www.lse.ac.uk/collections/media@lse/mediaWorkingPapers/>>, accessed 12.01.2014.

1. *Download-to-‘own’ e-books and offline access library lending*

To date, the most common method of accessing e-book content has been via download, whereby the consumer³³, via a webpage, downloads a file to be stored on a hard drive or storage device. This is also referred to as the ‘electronic sell-through’ model.

It should be noted that the focus of this work is on commercial e-book access models that involve some form of subscription or payment, however efforts such as Project Gutenberg have digitised many more books which are available, for free, to read online or download in any format. This project digitises only public domain books, however authors may equally choose to make their works available for free as part of the open access movement. An example of this is the Baen free library.³⁴ Similarly, many e-book titles can be accessed for free in the Google, Kindle, iBooks stores or on sites such as BookBoon or The Open Library.

Examples of download models include the retail platforms of bookstores such as Waterstones, Hive, FNAC, the Amazon Kindle store, the Apple iBookstore, or Kobo Books. Once the transaction with the online store is completed, e-books can then be downloaded and stored on any format compatible device to be read (in principle) at any time by the consumer. However, unlike for print books the choice of store is not necessarily free for the consumer to make: Where e-books can be purchased depends on the device the consumer wishes to read them on. This brings new layers of complication which do not exist in the print book market, and as such the issue of interoperability and hardware choice are considered in the separate Section III below.

Although often assumed to be akin to a sale of a physical book, a core difference exists: in exchange for payment, in an e-book transaction a licence for use and not a right of ownership is granted. This means that what consumers can do with the content they ‘purchase’ is more limited than would be the case for print books. Licences may be revoked, meaning access is not unlimited³⁵ and certain conduct is prohibited as a result of constraints built into the legal framework (such as resale, examined in Chapter 6 of this thesis).

It can be noted as a side that although the status of digital downloads is unclear regards ‘exhaustion’, as part of their ‘licence’ some sharing of e-books may be permitted.

³³ Note that money does not necessarily change hands; out of copyright e-books are available for free as are numerous titles as per the author decided. Thus ‘consumer’ is to be understood in the broadest meaning.

³⁴ <<http://www.baenebooks.com/c-1-free-library.aspx>>, accessed 12.01.2015.

³⁵ M Ingram (2012), ‘A Healthy Reminder from Amazon: You Don’t Buy Ebooks, You Rent Them’ (Gigaom blog), posted 22.10.2012. <<https://gigaom.com/2012/10/22/a-healthy-reminder-from-amazon-you-dont-buy-ebooks-you-rent-them/>> accessed 10.07.2014.

Whether TPMs are added to the content or not, sharing is usually limited to a certain number of devices connected by the accounts of the purchaser. However, a certain amount of sharing outwith these devices may also be possible, replicating the physical book tradition of lending to a friend, during which time they are out of your hands as owner. Navigating to the 'loan this book' page allows Amazon Kindle e-book purchasers to insert the email address of a friend who is then sent an invitation to borrow the title. If the loan is not accepted within 7 days of the invitation being sent, it lapses. During this time, the original purchaser can no longer access this title. Amazon also offers its Prime members³⁶ access to its 'Owners Lending Library' allowing them to borrow one book a month for an unlimited loan period. An observable feature of this system is the use of ownership in goods rhetoric while applying provisions indicative that e-books are licensed services.

1. *Streaming and online-only access models*

As an alternative to downloading e-books for a one off payment, consumers may also choose to obtain e-books on loan from libraries³⁷ or via commercial subscription services. Both are available under two models: Online streaming and non-perpetual downloads to allow offline access.

Streaming services are currently less developed than offline access models, but can be thought of as the publishing equivalent of 'Netflix'; a network connection is needed at all times to access the content and since each page is individually loaded, when the network connection is lost the content cannot be accessed. Depending on the business model, the number of simultaneous users who can access a given title and/or the number of titles a single user can 'lend' can be limited. For example, users of Cyberlibris.com (France) pay a subscription fee depending on the package they want, which gives full access an online library without time limitations. No downloading is allowed, but content can be printed. Medialibrary.it (Italy) limits the number of simultaneous users and the number of loans per year. E-book.pl (Poland) holds academic titles, and for a 6 month subscription at €25 per month, students can access 50 titles of their choice.

Download subscription models are more developed, with many successful players entering this market. These enable readers to access the titles they 'check out' even

³⁶ Prime allows members benefits such as free shipping on all Amazon offers, for a yearly fee.

³⁷ Although not a core consideration within the scope of this thesis, it should be noted that in contrast to the situation of print books, there is currently no public lending right meaning that e-book access via libraries is only possible by contractual negotiation and a licensing scheme between the library and an e-book platform. See EBLIDA (2014), 'EBLIDA Response to the Public Consultation on the Review of the EU Copyright Rules', undated.
<http://www.eblida.org/News/2014/EBLIDA_response_to_Public_Consultation_on_EU_Copyright_rules.pdf>, accessed 20.03.2014; H Müller, 'Legal Aspects of E-Books and Interlibrary Loan' (2012) 40 (3) *Interlending & Document Supply*.

when they have no Internet connection, and so are more convenient for those using e-books on the go but without a data subscription. Such services offer access to a very large number of titles for a flat rate subscription cost per month of around 10€. Compared to download to 'own' model, where titles are usually 'sold' for around the same price as a printed copy, readers can gain access to many more titles for a much lower cost. The extent to which these services operate in competition will depend on a number of factors, such as the availability of the service in the country of the consumer, as well as the hardware that the consumer is using.³⁸ Both these aspects are discussed in more detail below, however in this context it can be noted that for Kindle e-ink reader users, Kindle Unlimited is the only option when it comes to e-book subscription services since the Oyster and Scribd apps (or any other app) cannot be installed on these devices. For tablet users, the market is more open and installation is possible, although not directly from the Amazon Kindle store which is likely to inhibit choice for at least a certain proportion of the market.

In contrast to library lending services offering offline access, commercial models do not tend to impose due dates, meaning users can access a title for as long as their subscription lasts. Some services do limit however the number of titles that a user can have on loan at any given; for example, Amazon's Kindle Unlimited³⁹ service imposes a limit of 10 titles on its German subscribers, although this is not the case for UK users. Other services include as Scribd⁴⁰ and Oyster.⁴¹

Offline access has emerged as the preferred route particularly for libraries. If we look to the UK, most local authorities (councils) are now using the Overdrive e-book access platform to enable patrons to download content to read on digital devices and other examples can be found across the MS.⁴² Under such models, a licence can be provided for either simultaneous or single access (multiple users can read same e-book, or only one

³⁸ The number of titles varies between (Kindle: 600,000, Oyster and Scribd: 500,000 as of May 2014) as does the range of titles (Kindle seems to offer more bestsellers, but Scribd goes beyond e-books also offering self published works, articles, etc). Also note that Kindle Unlimited also incorporates audiobook access.

³⁹ This was launched in the US in July 2014, in the UK in September 2014 and roll-out in the rest of the EU from October 2014.

⁴⁰ <<http://support.scribd.com/entries/25459-General-Terms-of-Use>> accessed 15.01.2015.

⁴¹ <<https://www.oysterbooks.com/legal/terms-of-service>> accessed 15.01.2015

⁴² Examples of limited access licence models are: Ebib.dk (Denmark) where the licence allows single-access however every 4 loans a new licence must be bought; eLib.se (Sweden) where a licence allows single-access and multiple loan limited to 28 days after which the file auto-deletes. E-books can be re-borrowed, but library must pay another fee. Cairn (France) operates under 3 different licences: (1) a unlimited access model which gives unlimited access for library members, either onsite or remotely. The prices for public libraries depend on the number of publications in the package, the number of inhabitants and the GDP per inhabitant in that country; (2) a usage based model where an administrative fee is paid in the first year, after the first year the fee is calculated by multiplying the usage observed the year before by a fixed cost per use and adding an administrative flat fee; (3) an on-demand models where users request content and the library then validates their request from a pre-paid amount retained by the library. See Federation of European Publishers (FEP), 'E-Book Lending Services (Unpublished Working Document)', 16.06.2013.

user can read the e-book), multiple loans (after a certain number of loans the library must 're-purchase' the title, simulating print lending⁴³) or time limited lending (renewal is possible, but after expiry of the loan period the copy is deleted). The exact terms and conditions are dependent on the agreement between the platform and publishers.

III. THE E-BOOK MARKET: HARDWARE, SOFTWARE INTEROPERABILITY AND CROSS BORDER ACCESS

This section outlines three features of e-books that distinguish them from print.⁴⁴ Firstly, hardware and software are needed to read e-books, meaning that additional investments are required on the part of the consumer. Secondly, due to formatting and interoperability restraints, this choice of hardware and software limits access to further e-book purchases from different outlets, meaning choice is also more limited than for print books, although it can also be considered less limited given that – thirdly – e-books can (in theory at least) be accessed any time, from anywhere and by anyone.

I. Necessity of hardware and interoperability concerns

Digital books (including audiobooks) can be distributed in physical or immaterial formats: audiobook and e-book files can be burnt onto CD-ROMs or distributed pre-loaded onto hard drives or USB sticks, however significantly more common in the e-book context is to access the file via the intangible medium of the Internet. Unlike print books, the ability to use digital books is dependent on a number of enablers. As is noted in some of the national legislation above, it is necessary to have a reader or player to make sense of the digitised file, and where books are accessed online through subscription or streaming models an Internet connection is clearly necessary. While some of these enablers – having access to the Internet or enough of an understanding of technology to open e-books even on a computer screen⁴⁵ – may seem simple and commonplace, for a certain part of our society they are preventative. This means that for some consumers, a choice will never exist between printed and digital books.⁴⁶ For these consumers, the market remains unchanged even given the digital wave.

⁴³ This number of loans per title before a new licence is needed is designed to recreate the print book situation where after a certain number of loans a library copy of a book would be too tattered or dog-eared to be used again.

⁴⁴ On qualitative vs quantitative impacts see U Kohl, 'Legal Reasoning and Legal Change in the Age of the Internet' (1999) 7 (2) *International Journal of Law and Information Technology* 123.

⁴⁵ European Commission (2013), 'Commission Staff Working Document: Digital Agenda Scoreboard 2013', SWD(2013) 217 final, Brussels, 12.06.2013, Chapter 3.

⁴⁶ F Kretzschmar, D Pleimling *et al.*, 'Subjective Impressions Do Not Mirror Online Reading Effort: Concurrent Eeg-Eyetracking Evidence from the Reading of Books and Digital Media' (2013) 8 (2) *PLoS ONE*.

2. *Formatting and technological protection measures.*

The e-reader market can broadly be divided into two types of devices: dedicated e-readers designed for reading book content (e.g. the Kindle, Kobo, Nook) and multifunction tablets designed also for other application based activities such as browsing the Internet and watching films as well as reading book content (e.g. the Kindle Fire, iPad, Samsung Galaxy). Within the tablet and dedicated e-reader categories, when it comes to *using* e-books on these devices (i.e. purchasing and subsequently reading them) we can distinguish open format systems from closed format systems, as well e-books with or without technology protection measures (TPMs) or digital rights management (DRM). What is important to understand is that the consumer's ability to choose amongst e-book retailers depends on the openness of the system used by their device (format requirements) *and* any TPMs that are added to e-books, usually by publishers. Because of the importance of these features for the e-book market landscape, the following section will attempt to demonstrate as briefly and in as simple a manner as possible just how complicated for consumers e-book purchasing can be because of the combination of formatting and DRM.

The term 'closed system' means that e-books are only readable on certain makes of devices, while open formats can be used any device supporting them. The best example of a closed system is the Amazon Kindle e-reader; when buying a Kindle, consumers are obliged to purchase KF8 formatted e-books, which can only be bought through Amazon. For the Kindle tablet model (the 'Kindle Fire') the situation is less rigid, since this device allows for software applications ('apps') from third parties to be downloaded so that purchases outside the Amazon ecosystem are possible. For users of tablets produced by other manufacturers, e-books purchased with the proprietary KF8 format cannot be automatically read, however by downloading the Kindle App this is now possible. In closed ecosystems, the choice of retailer is therefore contingent on there being an e-reader app available for the device and which supports that format.

Of the open formats, the most widespread is ePub. If we look at the Apple iPad, it comes pre-loaded with the 'iBooks' application, which can read the ePub format as well as PDF files. E-books in ePub format can be purchased through the Apple iBookstore or other retailers and imported into the iBooks app or another reading app. Apple also sells .ibooks and Fixed Layout ePub formatted e-books which are DRM protected but also proprietary in nature: They cannot be used outside of the iBooks environment.

The above measures affecting interoperability are frequently confused with Technological Protection Measures (TPMs), such as DRM and watermarking, which are applied to e-books with the purpose of preventing or protecting the content therein

from unlawful copying and sharing. Whereas rightholders tend to support the addition of TPMs to their content, they have stood against the models of vertically integrated hardware producers-retailers, whose interoperability (formatting) restrictions affect consumers' ability to read different formats or and limit cross-platform access. A report from April 2013 from the Johannes Gutenberg Universität in Mainz, endorsed by the European Commission, the European Booksellers Federation and the Federation of European Publishers, calls in this respect for cross-ecosystem e-book formats and 'interoperable DRM mechanisms' to enable a 'free choice on the part of customers between different e-book stores and retailers', in keeping with the digital internal market aspirations.⁴⁷

TPMs are added to content to counter the impact of the digital environment that means that once consumers download a copy of a work, they can circulate new copies of e-books quickly, easily and without losing quality or alienating their own copy as would be the case for print books.⁴⁸ This approach is not unique to the publishing sector; instead, copying and sharing of content is a issue which all content industries have been grappling with from the 1990s when the simultaneous rise in the use of home computers and the use of the music CD as the standard format for music distribution, replacing analogue LPs and tapes, combined to balloon in the numbers of copies being made.⁴⁹

DRM protection adds another layer of complexity to the e-book user experience since the encryption mechanisms can only be 'read' by certain e-readers. This means that not only must consumers consider in advance which device they would like to purchase and the associated format restrictions, but where a choice of retailers is available for that format they must also take into account any DRM protection added to their purchase which will then determine the e-reader on which they actually read the book. The DRM encryption system used limits the applications through which end consumers can

⁴⁷ C Bläsi and F Rothlauf, 'On the Interoperability of Ebook Formats', Johannes Gutenberg-Universität, Mainz, Germany April 2013. <<http://wi.bwl.uni-mainz.de/publikationen/InteroperabilityReportGutenbergfinal07052013.pdf>>, accessed 12.01.2015. The author would like to thank Prof. Bläsi for his insights which have added to the present work.

⁴⁸ This is what Kohl refers to as a 'quantitatively new legal problem' Kohl, 'Legal Reasoning and Legal Change in the Age of the Internet' (1999), p. 127.

⁴⁹ Of course, not all of these copies were intended for recirculation: the vast majority of individuals engage in copying of digital content from physical CDs to be stored as Mp3 files on their computers for their own personal use. However, the onslaught of piracy facilitated by the new increasingly networked environment brought stakeholders to react with fervour. In 2000 Sony BMG made an early attempt at protecting its music CDs from copying. When loaded onto a computer allowing CDs to 'auto-run', the CD would automatically launch a 'rootkit' which would be installed onto the computer even before the end-user-licence agreement appeared (but, no matter, the EULA did not mention this software anyway!). This rootkit was intended to ensure that the content could not be copied, but came with the side effects of drastically slowing system performance, opening the system to viruses and even full crashes. The result was a successful lawsuit against Sony and the lesson that if music content is going to be distributed on CDs then rightholders would be better concentrating their efforts on those consumers copying works for further (illegal) distribution than on stopping all outright.

actually read their e-books; consumer choice of retailer is – even where open formats like ePub are supported – therefore also linked to the availability of e-reader apps for their device.

The app chosen must be capable of reading files protected by a specific type of DRM. For example, if purchased from the iBookstore, they are encrypted with DRM protection (using Apple's FairPlay DRM), meaning that they cannot be exported and read elsewhere. They can nonetheless be synched with multiple devices authorised to use the purchaser's account (limited to 5 devices⁵⁰). Amazon similarly encrypts its e-books with Amazon DRM which cannot be read outside the Kindle environment (adding an extra layer of insulation to the closed Amazon ecosystem).

We can also look at the use of Adobe DRM, currently one of the most popular DRM systems used by rightholders in Europe which is added to most ePub versions of e-books. Adobe DRM protected content cannot be read in the iBooks or Kindle applications. This prevents consumers who buy even ePub content which is in theory importable into iBooks from doing so. Instead they must download an e-reader application which is capable of reading that DRM, such as 'Adobe Digital Editions' (ADE) which can be downloaded onto a tablet or computer.⁵¹ The Kindle Fire, an Android-based tablet version of the original Amazon Kindle, allows consumers to download Apps that appear in the Kindle Store as well as other Android apps that can read ePub (or other format) files. For Adobe DRM protected files, users may access their purchased content either using their account details for the retailer or an Adobe ID. Signing up for an Adobe ID effectively connects the consumer and their purchases to their devices (up to 6 can be registered to one ID) and prevents content being locked to one device. In order to get an Adobe ID, Adobe Digital Editions must be downloaded on to a computer and activated with an e-mail address and password; an annoyance if the intention is to only read e-books on a tablet or other device. However, obtaining and subsequently logging in with an Adobe ID on a single app has the benefit of allowing users to collect their Adobe DRM-protected e-books bought from different retailers in one place, allowing them to transfer protected content between devices, up to a limit of 6 in total.

App availability is therefore important for the durability of e-book content: Apps serve to open 'closed' systems and allow users continued access to purchases made on previously-owned devices, or to choose between alternative retail outlets. However, the

⁵⁰ Each Apple ID can be connected to 10 authorised devices (tablets, smartphones, computers, etc.), of which a maximum of 5 can be computers. However, a 90 day rule. The 10 device limit can be seen as an attempt to transfer the 'private copying' exception designed for printed materials into the digital realm.

⁵¹ Note that dedicated e-readers (as opposed to tablets) do not allow app support.

closed systems of Apple and Amazon in particular – a combination of their formatting (Amazon) and their type of DRM (both Amazon and Apple) – mean that consumers can never, if they truly want to ‘shop around’ and buy also from these retailers, collect all their e-book purchases in a single reader. The difficulties in keeping track of purchases would seem to indicate that consumers are unlikely as things stand to really shop around from different retailers if this means they cannot access them on their ‘habitual’ app or across their various devices.⁵² Although accessing e-books from different retailers should in theory be easier because of the transparency of pricing and different offers available on the Internet, the combination of multiple DRM systems and non-uniform formatting is that in reality consumers cannot avail themselves of one of the theoretical benefits of e-books: their accessibility.

3. *Facilitated cross-border access*

Another major difference between offline and online distribution of content is the ‘death of distance’; where transactions take place via the Internet, distance is reduced as a factor influencing the consumer choice of retailer.⁵³ There are two points to be made in this section: Firstly, although the Internet should open up previously unreachable markets in other countries either within the European internal market or further afield, this does not necessarily happen as fully as one might expect for a number of reasons. The bottom line is that consumers still tend to shop within their own countries – both via e-commerce and when downloading intangible content – despite the Internet facilitating access to non-national markets particularly where intangible content is being circulated because delivery costs and times are no longer important. Secondly, the point is to be made that grants of book publishing rights are made on a language, not country, basis. This means that there are – in theory – no blockages to publishers marketing e-books in numerous countries (the situation is therefore distinguishable from the rights frameworks for music or film). However, in practice, cross border offers seem to be being limited; part (b) of this section gives some examples.

⁵² E.g. The present author downloaded the Kobo, Kindle, iBooks and Adobe Digital Editions apps onto her Mac computer. She purchased three English language e-books from UK based stores: one KF8 formatted from the Kindle store, and two e-pub editions, one from the iBookstore and one from Waterstones.com. In Kobo the Kobo app, imports were not allowed; only Kobo purchases can be read in it. In the Kindle app, imports were also not allowed and exports of the kindle purchase were useless given that the KF8 format is not supported elsewhere. In iBooks, it was not possible to import the Waterstones purchased e-book because it contained ADE (not fairplay), although unlike the Kindle app imports of non-DRM protected ePub e-books would be possible. In ADE, the Waterstones e-book could be read using an Adobe ID. The iBooks purchase could not be imported. In ADE, alongside the Waterstones purchase, purchases of ADE protected and DRM free e-books could be seen on the ‘bookshelf’.

⁵³ E Gomez-Herrera, B Martens *et al.*, ‘The Drivers and Impediments for Cross-Border E-Commerce in the EU’, European Commission Joint Research Centre and Institute for Prospective Technological Studies Digital Economy Working Paper 2013/02, January 2013, at p. 5.

a. One-world publishing?

One of the greatest benefits of the Internet is that it offers consumers greater transparency as to offers available; to this, we can also add that their opportunities for cross-border comparison and purchase are increased. However, ‘one world publishing’⁵⁴, encouraged by ‘porous national boundaries’ offered by the Internet⁵⁵ is not as prevalent as we might expect.

Firstly, we can observe that the Internet has influenced the marketplace, primarily because it has enabled large global players to emerge as forerunners; and although nationwide chains do compete with these players, local and independent stores have little or no online presence. The Internet has already affected the publishing landscape for sales of physical books, moving readers from local stores towards national retailers, or further still to e-tailers. Although the UK Booksellers Association reported that during Independent Booksellers’ Week 2013 66% of people still prefer to pick up a book in a bookstore before buying, the phenomenon of ‘showrooming’ – where customers browse in bricks and mortar stores and then purchase online – has been facilitated by mobile technology and might well divert more consumers from high street purchases in future.⁵⁶

Between States, retailers tend to price (outside their country of business) at a standard European rate and with the Internet price transparency is increased; consumer need only click between websites to find the best deal, or can even use price comparison sites such as to determine the best deal for the title they are looking for, inclusive of shipping to the country of their choice. Internet shopping means that consumers can know more with less effort, which opens up foreign markets in a way that was not previously possible.

Geographically and linguistically, the EU is however a divided marketplace with important national operators present on each territory or in each language area (e.g. FNAC in France and Belgium, Waterstones in the UK, Thalia in Germany). This said, like for print books, language, informational issues, trust and cultural preferences play a significant role in stemming cross-border purchases. Retailers, including book retailers, tend to focus on supplying content that is transferrable into the local culture given

⁵⁴ JJ Esposito, ‘One World Publishing, Brought to You by the Internet’ (2011) 27 Publishing Research Quarterly 13.

⁵⁵ BS Blum and A Goldfarb, ‘Does the Internet Defy the Law of Gravity?’ (2006) 70 Journal of International Economics 384.

⁵⁶ The ‘evil’ of ‘showrooming’ came to the fore in 2011 when Amazon launched its price check mobile app. This app allowed consumers to check prices of goods in stores with those at Amazon.com by photographing bar codes on the back of books.

market conditions and language.⁵⁷ For this reason, booksellers even where they operate online stores, may not supply content that is desirable for non-national markets; where this is the case, consumers are consigned to national sales and the regulatory frameworks applicable. The cross-border reach of retail channels is also limited because of informational and trust issues. As marketing of websites is often limited to countries where the core consumer base is located, readers may simply not be aware that alternative retail channels exist.

A 2004 Eurobarometer study of the European Commission provided that only a 'relatively small minority' were making distance purchases via the Internet, pinpointing mistrust and a lack of reliability as the cause, however the study did point out that the majority of purchases that were done over the Internet were for 'commonplace, fairly inexpensive items' such as books, CDs, DVDs, without giving exact figures.⁵⁸ The Digital Agenda and Licences for Europe initiatives of the European Commission have both more recently highlighted that although the possibility for cross-border purchasing behaviour is increased where goods are sold on the Internet, the extent to which European consumers make use of this opportunity is relatively low.

Although the Internet therefore has the potential for allowing global markets to develop, numerous studies have shown that a 'law of gravity' applies for both physical and digital purchases. Consumers show a 'home-bias' and where they do transact transnationally they are more likely to purchase from websites based geographically close to them.⁵⁹ This choice is greatly influenced by language and culture.⁶⁰ For example, studies relating to the audio-visual industry have indicated that cross-border demand is mainly driven by those who speak English as a second language or who are migrants living outside their home country.⁶¹

Looking at the trade between US states and between EU MS and controlling for language, Pacchioli finds that trade within national border in the EU context is three to

⁵⁷ Plum Consulting (Reporting to the European Commission), 'The Economic Potential of Cross-Border Pay-to-View and Listen Audiovisual Media Services: Executive Summary for the European Commission', London, UK, at p. 6 (asking 'Who may be interested in cross border audiovisual services?'). <http://ec.europa.eu/internal_market/media/docs/elecplum/plum_tns_summary_en.pdf>, accessed 02.04.2014.

⁵⁸ Esposito, 'One World Publishing, Brought to You by the Internet' (2011), p. 14.

⁵⁹ C Pacchioli, 'Is the EU Internal Market Suffering from an Integration Deficit? Estimating the 'Home-Bias Effect'' CEPS Working Document No. 348.

⁶⁰ Civic Consulting, 'Consumer Market Study on the Functioning of E-Commerce and Internet Marketing and Selling Techniques in the Retail of Goods', Berlin, at pp. 32-34. <http://ec.europa.eu/consumers/consumer_research/market_studies/e_commerce_study_en.html>.

⁶¹ European Commission (2004), 'Eurobarometer: Qualitative Study on Cross-Border Shopping in 28 European Countries', DG Health And Consumer, Brussels, 05.2004.

four times as much as within a single US state.⁶² The paper underlines that this may be attributed to an indeterminate number of factors, ranging from consumer trust to market-partitioning practices, but that language differences do significantly impact on the take-up of cross-border trade opportunities.⁶³ This is upheld by a Study by the European Commission's Joint Research Council, underlining that 'socio-cultural variables such as language increase in importance and counterbalance the declining cost of distance'. This study also highlights that although distance may be reduced as a contributing factor for rejecting distance trade options, other trade costs are important in the online environment: the study in particular refers to trust in payment systems and delivery options⁶⁴. Blum and Goldfarb, in a US based study testing the gravity theory on digital intangibles (i.e. where there are no trade costs such as delivery to take into account) find that 'taste-dependent differentiated products are affected by distance while more homogeneous products are not'.⁶⁵

Books, with strongholds by national authors and differentiated literary preferences between States, clearly come into the former category. As books are highly culturally and linguistically dependent, there may be a natural limit to the appeal of cross-border purchasing. Although online sales of books have grown, there is little data to quantify fluctuations in cross-border purchasing patterns. Surveys indicate that book purchase decisions are heavily influenced by subject-area, author and recommendations; books that fall into the 'want' category rather than the 'need' one are likely to be prompted by word of mouth and marketing. Territory specific marketing has been a common feature of publishing even in the Internet-era⁶⁶, to the extent that book rights are often held by different publishers for different markets granted depending on their ability to market the book profitably. Certainly, If the Internet breaks down territorial barriers then the necessity for profit-maximising choices of publishers depending on the specificities of each market place disappears; where feasible authors will naturally want to move towards granting worldwide rights to the player who can exploit those best, favouring consequentially the larger publishers with wide distribution networks. If this 'no borders' effect of the Internet holds then a move to global publishing seems inevitably to lie ahead. The picture is changing for e-books where authors retain may those rights

⁶² Pacchioli, 'Is the EU Internal Market Suffering from an Integration Deficit? Estimating the 'Home-Bias Effect'', p. 15.

⁶³ Ibid, pp. 15-18.

⁶⁴ Gomez-Herrera, Martens, and Turlea, 'The Drivers and Impediments for Cross-Border E-Commerce in the EU' (2013), pp. 6-7.

⁶⁵ Blum and Goldfarb, 'Does the Internet Defy the Law of Gravity?' (2006). Note that the study does not look at books specifically.

⁶⁶ Esposito, 'One World Publishing, Brought to You by the Internet' (2011), p.15.

themselves⁶⁷ and where print editions may not – at least initially – exist. Non-mainstream models for digital books at least, such as self-publishing or fan fiction may increase the global outlook of the reader base.

b. Territorial restrictions limiting the market?

Linguistic, taste and culture differences between national reading preferences may well contribute to the limitations of cross-border book commerce, however insofar as print books are concerned there are no clear limitations on firms (or consumers) transacting across borders.⁶⁸ As a matter of EU law and books must be able to be traded freely across borders, even where fixed pricing systems are in place: because of price restrictions on purchases in the national territory it may be appealing for a consumer based in France (with publisher-set prices) to purchase from a Belgian e-tailer (Belgium has a shared language and no fixed price). Price comparison sites such as Booksprice⁶⁹ allow for increased pricing transparency and with 54% of consumers making purchase decisions based on price this opportunity for comparison is important for the development of cross-border trade.

With the exception of content sold pre-loaded onto hardware, e-books can *only* be purchased via the Internet; as consumers, we should be considering cross-border purchases as a realistic and feasible option, although linguistic barriers will nonetheless stem the possibilities for such trade. However, for e-books the possibilities for cross-border access in fact seem much more restricted than for purchases of print books; a matter has not (yet) received attention at the EU level.

A recent Eurostat survey found that ‘32% of retailers cited contractual restrictions in their distribution agreements as the reason for refusing to supply services cross-border’.⁷⁰ Research for this work appears to support the findings of this study in the e-book environment, although quantitatively it is hard to judge how much of the market is affected. The present author contacted publishers from several MS, and received a definitive response that territorial sales restrictions are not imposed; unlike the rights

⁶⁷ Print/audio and e-book rights are generally separable; if e-book rights are not explicitly granted they are retained by the author. This leads to interesting opportunities for authors, as the ‘Pottermore’ experiment has shown, see Dean Wilson (2011), ‘J K Rowling Unveils Pottermore and Dm-Free Harry Potter Ebooks’ (The Inquirer blog), posted 23.07.2011. <<http://www.theinquirer.net/inquirer/news/2081247/rowling-unveils-pottermore-drm-free-harry-potter-ebooks>> accessed 01.05.2014.

⁶⁸ The Commission investigation into the German Sammelrevers concerned the *implementation* of the German FBP law, but not the existence of the law itself.

⁶⁹ For example in the UK: www.best-book-price.co.uk, www.bookbrain.co.uk, www.bookkoob.co.uk, www.luzme.com. In the US: www.addall.com, www.bestbookbuys.com, www.bookfinder.com. See <http://www.booksellers.org.uk/BookSellers/media/SiteMediaLibrary/IndustryNews/Book-Price-Comparison-Engines.pdf>, accessed 15.01.2015.

⁷⁰ European Commission (2015), ‘Eurostat - Information Society Statistics - Households and Individuals’, April 2014. <http://ec.europa.eu/eurostat/statistics-explained/index.php/Information_society_statistics_-_households_and_individuals>, accessed 17.05.2015.

frameworks film and music, book rights are acquired on a language basis meaning that if a publisher acquires rights for a French language title, that publisher can market the book across Europe. Nonetheless, complaints were being presented to the European Commission about certain publishers' refusals to allow local retailers to supply their e-books.⁷¹ It appeared that in practice, territorial restrictions - that do not stem from contractual systems of grants of rights - were being applied by e-book retailers and publishers, which act as 'brakes' on the impact of cross-border trade on existing frameworks. From the publishers' standpoint and given the nature of rights acquisition, such a refusal could only take place where there were specific concerns that retailer is not capable of providing services across borders, for example because payments cannot be processed internationally, or the infrastructure is not in place to differentiate between national and non-national customers to apply the correct pricing according to FBP rules or, as of 2016, country of destination VAT.⁷² Where they do contract, but there is a risk that the retailer cannot meet the above guarantees, it seems publishers may limit sales to certain territories in order to ensure the services can be carried out and regulations complied with. These limitations are therefore not as a result of territorial grants of rights, but because of the technological specificities of the e-book and the need to comply with certain regulatory structures in place.

Problems leading to limited cross-border offers, rather than stemming from agreements between publishers and retailers, seem also to be present in the downstream: Although publishers are giving licences for Europe-wide distribution, retailers are limiting their sales to single or groups of specified national markets. For example, the terms and conditions for downloading e-book through the French retailer FNAC specifies that the e-book files it offers are only for purchase by consumers resident in France at the date of purchase and that the consumer will have to declare prior to purchase that he or she is resident.⁷³ In practice therefore, non-French residents are unable to purchase e-books from FNAC.⁷⁴ These terms also apply to downloads of non-French published and non-French language books, indicating that the reasoning is not linked to the 'watertightness' of fixed book pricing systems for e-books which in France require the publisher-set price to be applied to all sales of French-published books to consumers based in France. UK retailer Waterstones determines the location of the consumer based on their VPN

⁷¹ The complaints were not published.

⁷² Licences for Europe WG1 – Print Subgroup, 'Presentation to the 4th July 2013 Mid-Term Plenary Summarizing the Sub-Group Discussions on the E-Book Market and on Interoperability', 04.07.2013.

⁷³ FNAC (undated), 'Conditions Générales de Téléchargement Livre Numérique', <<http://www4.fnac.com/Help/ebook-cgv.aspx#bl=foot>>, accessed 02.04.2014.

⁷⁴ The current author tested this by inputting a UK address in the purchase form. The error 'Titre non vendable dans votre zone géographique' was received. In a similar manner, the UK website Hive denies sales to consumers unless they hold a credit/debit card from a UK bank. Purchase was denied when using a non-UK card registered to a UK address.

address and their billing address⁷⁵ and the location of their bank.

The web resulting from territorially restrictive downstream terms and conditions is that, despite first appearances, purchasing e-books in a country other than that in which you are based may be more difficult than for print books where the payment and delivery address are irrelevant.⁷⁶ This is particularly damaging for consumers who wish to access culture outside that of the country which they are based; the combination of reluctance to trade in such content because of its limited interested audience and the inability due to contractual limitations of consumers to access external content create a worrying picture. Although the Internet has the capacity to quantitatively alter the scale of cross-border commerce, in practice this is often not happening because of downstream contractual restrictions. The Eurostat survey noted above (finding ‘32% of retailers cited contractual restrictions in their distribution agreements as the reason for refusing to supply services cross-border’)⁷⁷ amongst other similar factors has led the Commission to launch a sector inquiry into e-commerce relating to the online trade of goods and the online provision of services⁷⁸ as part of its Roadmap for completing the Digital Single Market⁷⁹. Although at the time of writing there is no confirmation that the sector inquiry will look specifically at practices relating to (e-) bookselling, the Commission does in its accompanying Fact Sheet on the Digital Single Market Strategy mention the e-book in no less than 4 examples⁸⁰ and certain players within the publishing industry have already indicated that they have high hopes this will be the case.⁸¹ The Commission has stated that it expects to publish a preliminary report for publication in 2016 and a final report in the first quarter of 2017.⁸²

IV. CATEGORISATION OF BOOKS AND E-BOOKS IN LEGAL TERMS

⁷⁵ It does allow for payment using non-UK bank cards.

⁷⁶ With one small exception for payment by cheques, which must be (under the FNAC terms and conditions) from a bank established in France or in Monaco. See Conditions Générales de Téléchargement Livre Numérique (undated).

⁷⁷ EC - Eurostat - Information society statistics (2015).

⁷⁸ European Commission (2015), ‘Antitrust: Commission Launches E-Commerce Sector Inquiry’, Press Release IP/15/4921, Brussels, 06.05.2015. <http://europa.eu/rapid/press-release_IP-15-4921_en.htm>, accessed 17.05.2015.

⁷⁹ European Commission (2015), ‘A Digital Single Market Strategy for Europe’ (Communication), SWD (2015) 100 final / COM (2015) 192 final, Brussels, 06.05.2015.

⁸⁰ European Commission (2015), ‘Questions and Answers - Digital Single Market Strategy Factsheet’, Brussels, 06.05.2015. <http://europa.eu/rapid/press-release_MEMO-15-4920_en.htm>, accessed 17.05.2015.

⁸¹ L Campbell (2015), ‘Trade Responds to EC Digital Single Market Proposals’ (The Bookseller blog), posted 06.05.2015. <<http://www.thebookseller.com/news/trade-responds-ec-digital-single-market-proposals>> accessed 17.05.2015.

⁸² European Commission (2015), ‘Antitrust: Commission Launches E-Commerce Sector Inquiry - Factsheet’, MEMO/15/4922, Brussels, 06.05.2015. <http://europa.eu/rapid/press-release_MEMO-15-4922_en.htm>, accessed 17.05.2015.

Now that we have overview of the models under which e-books can be accessed as well as the features of the e-book market, it is relevant to move towards the perception of e-books in a legal frame. This section looks at e-books on two different levels: Firstly, how they fall to be categorised at the EU level, and secondly how they are treated at the national level. These levels interact with each other in such a way that one cannot be cleanly separated from the other: The EU framework limits ways a MS can treat published works insofar as they are subject to internal market rules, and the principle of subsidiarity means that the EU level cannot dictate national cultural policy choices.

We look first to the EU law division between goods and services. Here, the question is not only one of how e-books have come to be framed, but also one of how they should be framed. In the case studies contained in Chapters 5 and 6 on VAT and exhaustion, we will look in much greater depth at the EU legal frameworks established by the VAT Directives and the Copyright Directive in particular; the aim in this section is rather to highlight that in both of these areas a distinction is made on the lack of physicality of e-books, with the result that they are treated differently to tangibly embodied content. The choice of the EU legislator in both these instruments has been to prefer a services categorisation for intangibles, a stance that remains unchanged regardless of whether download-to-‘own’, a streaming, or a subscription model is used to access the content. Against the broader EU law background, the TFEU itself clearly makes a distinction between *goods* and *services*, however this distinction is more graduated than simple tangibility or a lack of.⁸³

The section then moves to look at definitions of e-books at the national level, which may be limited to some extent by the EU context. Here too, references to physical features of books are present when delimiting the scope of certain laws (e.g. references to paper pages as constitutive of a ‘book’). However more subtle elements also come into play such as the density of written content (are there multimedia elements also?) or the addition of format restrictions (is DRM added?). These elements make it much harder to draw a clear line between the treatment of book content in its various forms.

1. *EU Law – Goods, services and quasi-goods?*

As is examined more thoroughly in the context of the more focussed case study chapters, the lack of tangibility of e-books has led them to be categorised as Electronically Supplied Services (ESS) for VAT purposes and as ‘communications’ (as opposed to

⁸³ Title II of Chapter III TFEU deals with the free movement of goods while Title IV, Chapter 3 covers the free movement of services.

distributable and copies subject to ownership) in relation to copyright.⁸⁴

Both the above categorisations are the consequence of secondary instruments of legislation, however the Treaty itself clearly distinguishes between goods and services without designating what either is exactly.⁸⁵ What role does this distinction have to play in guiding legislators' choices of how to treat e-books? The closest we can get to a definition within the text itself is in Article 57 TFEU where a non-exhaustive list of 'services' is given, leaving the term to remain rather nebulous in character. In fact, services are most easily described by what they are not; 'services' are provided in so far as the activities 'are not governed by the provisions relating to freedom of movement for goods, capital and persons.'⁸⁶ E-books are clearly not capital or persons, but whether they are 'goods' also depends on the definition we assign to that term.

The CJEU seems to prefer a functional approach when interpreting the terms 'goods' and 'services', thus rendering neither category closed or exhaustive. Although it has generally considered goods to be 'objects', implying that materiality is required,⁸⁷ this has not always been the case: even where a physical presence is lacking, the provision of electricity has been categorised as a good. This was motivated by the fact that since gas and oil are goods, it is desirable for consistency to place electricity in the same category because they are in competition.⁸⁸ This decision can be connected to the central importance of equal treatment in European Union economic law: Equality in this context has been described as an 'instrument' for attaining the objective of internal market completion:

“Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental

⁸⁴ As explained in Chapter 6 the first sale (exhaustion) doctrine appears under the Copyright Directive to only be applicable where there has been a transfer of ownership in a material object; the proposed CESL also provides that sales can only cover physical objects.

⁸⁵ It is interesting to note by way of contrast that in the US, goods and services are both treated under the commerce clause of the US constitution Art 1 sect 8; this explains why the US shows a reluctance to create a divide in the WTO context. Title II of Chapter III TFEU deals with the free movement of goods while Title IV, Chapter 3 covers the free movement of services.

⁸⁶ Article 57 TFEU.

⁸⁷ In *Walloon Waste*, the Court provided that 'objects which are shipped across a frontier for the purposes of commercial transactions are subject to Article 30 EC, whatever the nature of those transactions' Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* [1992] ECR I-4431. See also J Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (Oxford: Oxford University Press 2002), Introduction.

⁸⁸ Case 6/64 *Costa v Enel* [1964] ECR 585, and Case C-393/92 *Gemeente Almelo et al v Energiebedrijf Ijsselmij NV* [1994] ECR I-1477. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (2002), p. 4.

philosophy of the common market.”⁸⁹

Woods lists three criteria commonly identified in case law as distinguishing services from goods: (1) services cannot be stored (goods can); consequently (2), ‘production and consumption of services must take place simultaneously’; and (3) services are intangible, although they might have a tangible result.⁹⁰ It is clear that e-books delivered under download-to-‘own’ models sit awkwardly with the first and second of these generalisations. E-books any other downloadable content can be stored for use at a later point by the consumer, unless use is limited through technology by the content provider (in which case such transactions would not fall under the download-to-‘own’ model). Nor does consumption take place simultaneously where content is downloaded: e-books can be read and re-read once downloaded and stored by the user.

Where the download-to-‘own’ model is used a ‘services’ classification seems to be particularly inept. This point was made by Advocate General Kokott in her Opinion in *Football Associations*, where she mentions e-books as an example of services which ‘do not differ significantly from goods’ and says that, as such, ‘a strict delimitation of the two fundamental freedoms would be arbitrary’.⁹¹ Her statement here indicates a preference for retaining a categorization of digital intangibles as a service,⁹² but nonetheless treating them as a ‘quasi-good’ for practical purposes, a notion which seems to have been taken up at the legislative level in the Common European Sales Law (CESL).⁹³

In secondary legislation such a strict delimitation between ‘goods’ and ‘services’ seems not to be justified by the overall Treaty framework, even if this does divide the two. The goods vs services categorisation is not as limiting as it first appears and certainly it seems that blindly insinuating ‘difference’ based on intangibility or intangibility is not always befitting. Although the Treaty does not make any provision for neutrality between the

⁸⁹ Tridimas, *The General Principles of EU Law* (2006), pp. 75-76.

⁹⁰ L Woods, *Free Movement of Goods and Services within the European Community* (Aldershot, England: Ashgate 2004), pp. 18-19.

⁹¹ Opinion of Advocate General Kokott of 3rd February 2011 in Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2009] ECLI:EU:C:2011:43, [185]. This point was not picked up on by the CJEU.

⁹² This said, her categorization difficulties are highlighted when she says later that she fears that delimiting markets based on IPRS will mean that ‘access to the *goods* in question will be granted subject to differing conditions’ and continues that ‘access to such *goods* is completely precluded on many markets’ (emphasis added). The ‘goods’ she refers to here are in fact e-book, as demonstrated by her reference to territoriality restrictions imposed by UK retailers in 2010 that directly follows. Her terminology interchanges e-books as ‘services’ and ‘goods’ in the space of two paragraphs, reinforcing the feeling that the divide is narrow if not inexistent.

⁹³ This categorization problem is discussed in more detail in the context of Chapter 5 on exhaustion. H-W Micklitz and N Reich, ‘The Commission Proposal for a “Regulation on a Common European Sales Law” - Too Broad or Not Broad Enough?’ European University Institute, Department of Law, European Regulatory Private Law Project (ERPL-03) European Research Council (ERC) Grant. accessed

different freedoms, consistency and legal certainty are required because it would be ‘anomalous if the results were different depending on which provision was deemed to be applicable.’⁹⁴ As such, we are back to the question of how to decide where the same treatment is justified if not on the basis of tangibility, a question that will be addressed in Chapter III.

2. *National definitions*

E-books are electronic texts which may or may not have a print counterpart; due to reduced production costs and the increasing popularity of self-publishing, for many authors disseminating their content in e-book form is an key alternative to having their book appear in print. Quickly, therefore, we come down to definitions.

This section will look at where ‘books’ are defined in national law, drawing upon a number of features of ‘books’ that are more or less inclusive depending on the State in question and the area of law; depending on where the line is drawn, e-books may fall within the same definition or be distinguished for their specific features. Frequently, lines are drawn in national VAT and FBP laws pushing print books and e-books apart through definitions that refer to:

- Physical features (e.g. ink, paper pages)
- Inclusion or non-inclusion of multimedia (non-text) elements.
- The way content is accessed (access models or hardware/software)

a. VAT : References to physical features

Many MS laws are limited in scope to physical books because they make reference to paper and printed text. This has the effect of excluding not only e-books but also audiobooks – either on CDs or CD-ROMs or as downloads – from certain rules. Limitations on downloaded e- or audio-books benefitting from reduced rates of VAT stem from the EU level, and the majority of MS are at present voicing discontent with the situation although they are bound to the EU rules.

In most EU countries, VAT laws are limited to printed books by reference to pages or printing. Where this is the case, this tells us something interesting: that such states have chosen not to make use of the possibility that is open to them under the VAT Directive to also extend their reduced rates to audio book content on CD ROMs or USBs sticks

⁹⁴ Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (2002). Snell concludes that “The same trade policy goals, principles, procedures and techniques can be used in both sectors. The differences examined, such as the different modes of the supply of services, the greater intensity of regulation in the services sector, the regulation of service suppliers instead of the product, and the intangible character of services, do not necessitate a fundamentally different approach.”

(i.e. audio content sold on a physical medium). Examples of such countries are the UK, where the term ‘books’ is interpreted in its ‘ordinary, everyday sense. This means they are restricted to goods produced on paper and similar materials such as card.’⁹⁵ In Austria books have also been limited to printed pages in the VAT context.⁹⁶ In Germany, this was also the case until November 2014. Until this point, Annex 2 point 49 of the Umsatzsteuergesetz (UStG) provided that only the following would be within the scope of the law:

“[B]ooks, brochures and similar printed matter, whether in serial instalments, single sheets, intended for stitching, cartonning, or binding, as well as newspapers and other periodicals paperback, hardcover or except in collections with more than one number under a single cover (those predominantly contain advertising).”⁹⁷

In November 2014 this was adapted to include also audio books on CD, although not intangible e- or audio-books which are both still restricted by the current EU framework even if Germany would seem to support such a change.⁹⁸ Under the revised UStG, audio books stored on ‘disks, tapes, USB sticks (memory devices), ‘smart cards’ and other similarly recording mediums of sound or carrier’ which ‘exclusively contain audio recording of the reading of a book’ are now subject to reduced rates. Even although the definition is now broader, the scope of application is still limited with reference to physical features.

⁹⁵ Reduced rate items are contained in Group 3 of schedule 8 of the Value Added Tax Act 1994. For interpretation, see HM Revenue & Customs (2010), ‘Zero-Rating of Books Etc’, HMRC Reference: Notice 701/10 London, December 2010.

<http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000102#P293_29418>.

⁹⁶ Bücher, Broschüren und ähnliche Drucke, auch in losen Bogen oder Blättern Anlage (zu § 10 Abs. 2 und § 24 UStG), 43(a).

⁹⁷ Umsatzsteuergesetz Annex 2, point 49.

⁹⁸ Umsatzsteuergesetz Annex 2, point 50 Bundesministerium Der Finanzen (2014), ‘Umsatzsteuer; Ermäßigter Steuersatz für Umsätze mit Hörbüchern (§ 12 Absatz 2 Nummer 1 Und 2 I. V. M. Nummer 50 Der Anlage 2 Zum Ustg)’, K 2014/1064319, Berlin, 01.12.2014. See also: Börsenverein des Deutschen Buchhandels ‘Glossar - Mehrwertsteuer’, <<http://www.boersenverein.de/de/portal/glossar/157963?glossar=M&wort=188254>>, accessed 02.10.2014; E Beer (2014), ‘Taxation of Printed Subscriptions Combined with Epaper’, KMLZ - VAT Newsletter 19/2014, published online 02.09.2014. <http://www.kmlz.de/en/Newsletter_19_2014>, accessed 02.10.2014; Bayerischen Landesamts für Steuern (Bavarian State Tax Office) (2014), ‘S 7200.1.1-21 / 4 St33 from 06/12/2014’, S 7200.1.1-21 / 4 St33, München, 12.06.2014, point 2. <<http://www.finanzamt.bayern.de/Informationen/Steuerinfos/Steuerarten/Umsatzsteuer/>>, accessed 02.10.2014. On the German Government perspective see, for example, B Gräber and M Greive, ‘Steuersatz für Hörbücher sinkt von 19 auf 7 Prozent’, Die Welt, 11.07.2014. Available at: <http://www.welt.de/finanzen/article130069473/Steuersatz-fuer-Hoerbuecher-sinkt-von-19-auf-7-Prozent.html>, 12.01.2015.

b. VAT : Broader references

In Luxembourg, the VAT law refers to ‘[l]ivres, brochures et imprimés similaires’⁹⁹. This sounds very similar to the German law, however the opposite stance was taken; rather than limiting the interpretation to physically embodied content, the Government of Luxembourg has chosen to interpret this provision as applying to all book content: text and audio, whether in printed, physical digital or intangible digital form.¹⁰⁰ This move decision, taken by the Grand Duchy ‘for reasons of neutrality’ has now been put in check by the CJEU ruling of 5th March 2015 in Case C-502/13 *Commission v Luxembourg*, as is discussed in more detail in Chapter 3.III and Chapter 6.I of this thesis.¹⁰¹

In France, like in Luxembourg, the scope of ‘books’ subject to reduced rates of VAT was also extended and this extension has since been rejected as an infringement of France’s obligations under the VAT Directive.¹⁰² Prior to the extension, the French VAT law made reference to books as ‘printed works’¹⁰³; afterwards the reduced rate of VAT (5.5%) was applied to ‘books, including their rental... on all types of physical support, including those supplied via download.’¹⁰⁴ Although like in Luxembourg the normal rate is to apply again from 1st January 2016 as a consequence of the CJEU ruling, it is nonetheless interesting to discuss the contours of the French definition. On 29th December 2011, a rescript was issued following a specific demand as to the interpretation of this provision. It specified that:

“The book, whether digital or on a physical support, has as its object the reproduction and representation of an intellectual work created by one or more

⁹⁹ Government of Luxembourg (1991), ‘Règlement Grand-Ducal du 21 décembre 1991 déterminant les limites et les conditions d'application des taux réduit, super-réduit et intermédiaire de la taxe sur la valeur ajoutée.’, Luxembourg, 21.12.1991. <<http://eli.legilux.public.lu/eli/etat/leg/rgd/1991/12/21/n3>>, accessed 12.12.2014.

¹⁰⁰ Government of Luxembourg (2011), ‘Circulaire No 756 du 12 décembre 2011’, Direction de l'enregistrement et des domaines, Luxembourg, 12.11.2011. <http://www.aed.public.lu/actualites/2011/12/eBooks/Livres_num__riques_-_eBooks__Taux.pdf>, accessed 14.02.2014. Loi du 12 Février 1979 concernant la taxe sur la valeur ajoutée (TVA) : Texte coordonné du 01.01.2013. <http://www.aed.public.lu/tva/loi/Loi_TVA_2013_rect.pdf>, accessed 21.02.2014; Règlement Grand-Ducal du 21 décembre 1991 portant exécution de l'article 167, Alinéa 1er, numéro 5 de la loi du 4 décembre 1967 concernant l'impôt sur le revenu. (‘Luxembourg - Règlement Grand-Ducal du 21 décembre 1991’) JO du Grand Duchy de Luxembourg 27 décembre 1991 n.86 p.1837.

¹⁰¹ Case C-502/13 *Commission v Luxembourg* [2015] ECLI:EU:C:2015:143, judgment of 05.03.2015. European Commission, ‘Taxation: Commission Refers France and Luxembourg to the Court of Justice over Reduced VAT Rates on Ebooks’, (Press Release), 21.02.2013.

¹⁰² This case is also outlined in the above noted chapters. See European Commission, ‘Taxation: Commission Refers France and Luxembourg to the Court of Justice over Reduced VAT Rates on Ebooks’ (2013); Case C-479/13 *Commission v France* [2015] ECLI:EU:C:2015:141, judgment of 05.03.2015.

¹⁰³ Taxe sur la Valeur Ajoutée (TVA) - Taux réduit - définition fiscale du livre, Bulletin Officiel des Impôts, 3 C-4-05 N° 82 du 12 Mai 2005. <<http://www11.minefi.gouv.fr/boi/boi2005/3capub/textes/3c405/3c405.pdf>>, accessed 14.02.2014; Direction Générale des Impôts Instruction 3C-14-71 du 30 décembre 1971 (‘Instruction 2C-14-71 (1971)’).

¹⁰⁴ ‘Les livres, y compris leur location. Le présent 3° s'applique aux livres sur tout type de support physique, y compris ceux fournis par téléchargement.’

authors, consisting of graphical elements (texts, illustrations, drawings) published under a title.

The digital book only differs from the printed book by way of certain necessary elements inherent in its format. Typographical and composition variations, as well as the modalities of accessing the text and illustrations (associated search engine, ways of browsing or scrolling through content are considered as accessory elements that are specific to the digital book.

The digital book is made available on a public online communication network, notably by download or streaming, or on a removable storage device.”¹⁰⁵

This definition is clearly broader than the German amendment used above, but is interesting – more interesting than the ‘subsumption’ approach of Luxembourg – because although it does not distinguish on the basis of physical features, it does provide that:

(a) e-books are categorised alongside books on a physical medium under the umbrella of ‘books’: For VAT purposes, e-books meeting the definition and print books are considered equal;

(b) even ‘born-digital’ e-books can be subject to reduced VAT rates (i.e. where there is no printed version);

(c) ‘interactive’ e-books containing other media (audio, film clips) are not ‘books’ that can benefit from reduced rates.¹⁰⁶ For e-books to fall within the fiscal definition they must be ‘facsimile editions’ (livres homothétiques) of print books, capable of being printed out (except for the ‘accessory elements’) and therefore ‘reversible’ i.e. an e-book can be printed to become a physical book.¹⁰⁷

¹⁰⁵ Translation by the author. Original text: “Le livre, numérique, ou sur support physique, a pour objet la reproduction et la représentation d'une oeuvre de l'esprit créée par un ou plusieurs auteurs, constituée d'éléments graphiques (textes, illustrations, dessins...) publiée sous un titre. Le livre numérique ne diffère du livre imprimé que par quelques éléments nécessaires inhérents à son format. Sont considérés comme des éléments accessoires propres au livre numérique les variations typographiques et de composition ainsi que les modalités d'accès au texte et aux illustrations (moteur de recherche associé, modalités de défilement ou de feuilletage du contenu). Le livre numérique est disponible sur un réseau de communication au public en ligne, notamment par téléchargement ou diffusion en flux, ou sur un support d'enregistrement amovible.”

¹⁰⁶ Definition Fiscale du Livre (2005).

¹⁰⁷ Ministère du budget des comptes publics et de la réforme de l'état (2011), ‘Les enjeux de l'application du taux réduit de TVA au livre numérique’, Contrôle Général Economique et Financier, CGEFi - 11-08-51, November 2011, p. 14.

The scope of the French e-book definition is discussed throughout this thesis and in particular in Chapter 7, however for now it is interesting to note briefly a debate about their scope which came up in the French National Assembly. This debate questioned the extent to which e-books containing technological protection measures could be considered comparable to non-DRM protected e-books. Although not adopted, an attempt was made to introduce an amendment to the fiscal definition of a ‘book’ in the Finance Act in this respect by providing that the reduced rate would apply only to:

“[B]ooks, including their loan... on all types of physical support, including those supplied via download except the book or the files contain technical protection measures in the sense of Article L331-5 of the intellectual property code or if the book is not in an open format”.¹⁰⁸

This amendment was however removed from the draft and was not voted on in the Senate, a point that is not surprising since it would basically have been an admittance that e-books are digital service and would have done little to help the French negotiations with the European Commission over e-book VAT rates which were ongoing at that time, it does however raise interesting questions about whether the addition of DRM technology restricts the movement of e-books, the ability of consumers to use them as they will, their accessibility and their cultural benefits all in a way that is not present for print books. This consideration was also raised in the context of the Dutch ‘Digitally Binding’ report commissioned by the Dutch Ministry of Culture, Education and Science, where the argument is made that if the purpose of FBP is to increase the range of publications, then there will be even more titles open to illegal file sharing; adding DRM does nothing to the number of titles available, but could encourage readers to seek out hacked versions with DRM removed, particularly if the fixed price does not take account of the market climate. to examine the feasibility of fixed pricing for e-books.

c. FBP

The adoption of the French FBP law in fact came before the new VAT definition and was deemed necessary because the loi Lang referred to the previous fiscal definition of a

¹⁰⁸ Assemblée Nationale ‘Projet de loi de finances pour 2014 - (N° 1395) Amendement N° Ii-22 présenté par Mme Attard, M. Alauzet, Mme Sas, Mme Abeille, Mme Allain, Mme Auroi, M. Baupin, Mme Bonneton, M. Cavard, M. Coronado, M. de Rugy, M. François- Michel Lambert, M. Mamère, Mme Massonneau, M. Molac, Mme Pompili et M. Roumegas: Article Additionnel’, 11.10.2013. Original: “sauf si le ou les fichiers comportent des mesures techniques de protection, au sens de l’article L. 331-5 du code de la propriété intellectuelle ou s’il ne sont pas dans un format de données ouvert, au sens de l’article 4 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique.”

book¹⁰⁹, with the term ‘*un ensemble imprimé*’. At the time the law was being discussed, an alteration of this definition was not on the table nor was it desired because in the digital environment, for FBP purposes at least, a different approach was considered necessary to ensure the system could work.¹¹⁰ As such, a new FBP law for digital books was instead envisaged.¹¹¹ Under this law, in contrast to the VAT situation, the relation between print and digital versions is more complex:

“This law applies to a digital book when it is a work of the mind created by one or more authors and which is marketed in both digital form and published in print form, or when it is, due to its content and design, capable of being printed, excluding accessory elements specific to the digital publication.”¹¹²

For FBP to apply, the digital book must be available also in printed form (meaning that ‘born-digital’ e-books are not covered), or must be capable of being printed when additional ‘components’ are removed. The 2012 Decree that followed the Digital Book Law elaborated that such components could include multimedia elements, meaning that the definition of a book for FBP purposes is wider than the fiscal definition¹¹³:

“The accessory elements specific to digital publication mentioned in the 1st paragraph of Article 1 of the Digital Book Law include typographical and compositional variations, ways to access the illustrations and text such as through the associated search engine, ways of browsing or scrolling content, *as well as the addition of texts or information relevant the genre, notably sounds, music, animated or pictorial images*, which are limited in number and importance, complementary to the book and intended to aid comprehension.”¹¹⁴

Like the VAT definition, the FBP Decree specifies that the law applies to e-books distributed via download or streaming¹¹⁵, and neither contain the link with a physical

¹⁰⁹ Circulaire du 10 janvier 1990. The definition of ‘books’ for the purposes of VAT is was originally to be found in l’instruction fiscale en date du 30 décembre 1971 de la direction générale des impôts, replaced in 2005 by BOI 3 C-4-05 n° 82 du 12 mai 2005.

¹¹⁰ See FBP discussion in Chapter 7.

¹¹¹ Loi N° 2011-590 du 26 Mai 2011 relative au prix du livre numérique (‘French E-Book Law (2011)’) JORF n° 0124 du 28 mai 2011 page 9234, texte n° 2.

¹¹² Emphasis added. Ibid, Article 1. Translation by the present author.

¹¹³ (2011), ‘Décret N° 2011-1499 du 10 Novembre 2011 Pris en Application de la Loi N° 2011-590 du 26 Mai 2011 relative au prix du livre numérique’, NOR: MCCE1126876D.

¹¹⁴ Ibid, Article 1. Translation by the present author.

¹¹⁵ Ibid, Article 2; Direction Générale des Finances Publiques (DGFIP) (2011), ‘Rescrit N° 2011/38 - TVA : Taux et Définition du Livre numérique’, 29 décembre 2011. Note however that the FBP law excludes e-books available via collective licences for educational or professional use (French E-Book Law (2011), Article 2, paragraph 3.) See also N Gary (2014), ‘Lecture Numérique > Législation > Actualités des Livres en Abonnement Illimité, ‘Un mal nécessaire’, illégal ?’, Actualité, Actualité,

embodiment that is found at the EU level as discussed below.

The German definition of a book for FBP purposes looks very different to the VAT definition; the Buchpreisbindung Gesetz (BuchPrG) is wider in scope and covers ‘books’ as well as ‘products which reproduce or substitute books’ and ‘composite items for which one of the aforementioned products constitutes the main item.’¹¹⁶ Although audio-books are not covered by the law, the Börsenverein des Deutschen Buchhandels (the Book Trade Association, which consists of both publishers and retailers) has given the opinion that e-books are covered by the BuchPrG, on the basis that section 2.1 can be interpreted widely.¹¹⁷ This view has not been formally challenged in Court proceedings, and has been enforced in practice thus meaning authors and publishers of German language e-books are bound by the law.¹¹⁸ The view of the Börsenverein is not wholly without legal basis; an expansive interpretation – albeit to include text books on CD-ROM and not e-books, has already been accepted by the Federal Court of Justice.¹¹⁹

In Austria, until recently there was uncertainty regards the inclusion of e-books within the FBP definition, which had also referred simply to ‘books’. Some authors argued that an interpretation of the law to cover e-books as a ‘sub form of books’¹²⁰ was possible even without explicit reference to non-printed books. This interpretation has now been

<<https://www.actualitte.com/legislation/des-livres-en-abonnement-illimite-un-mal-necessaire-illegal-51754.htm>>, accessed 02.10.2014.

¹¹⁶ BuchPrG ss 2(1) Prior to 2002, the prices were applied by way of trade agreements. The ‘Drei-Länder-Revers’ agreement

¹¹⁷ Der Börsenverein des Deutschen Buchhandels, ‘Stellungnahme Zur Preisbindung Von E-Books’. <http://www.boersenverein.de/sixcms/media.php/976/Preisbindung_von_E-Books_Stellungnahme_des_Vorstands.pdf>, accessed 21.03.2014. Section 2.1 reads: “(1) Books for the purposes of this Act also include: 1. sheet music; 2. cartographic products; 3. products which reproduce or substitute books, sheet music or cartographic products and, upon due consideration of the overall circumstances, are to be deemed to be primarily of a typical publishing or bookselling nature; and 4. composite items for which one of the aforementioned products constitutes the main item.”

¹¹⁸ In February 2012 it was reported that the Berlin Story Verlag (publisher), had been offering one of its e-books (“*Der Letzte macht das Licht aus*” by Klaus Behling) for download without setting a price; consumers could either download the e-book for free or could pay a voluntary sum of their choosing. This model instigated a letter being sent by the ‘Preisbindungstrehänder-Kanzlei’, the firm charged with the enforcement of the BuchPrG, to the effect that allowing third parties (i.e. consumers) to set the price went against the BuchPrG. The letter highlighted that the publisher could offer the book for free and that this would be within the scope of the law. The publisher consequently set the price at 99c and asked consumers to get in touch with them to indicate what they thought the book was worth. The e-book is presently being sold at the fixed price of 9.99€ in Germany. Buchreport.de (2012), ‘Preisbindungstrehänder Zur E-Book-Affäre Von Berlin Story: “Wir Haben Nicht Abgemahnt”’, <http://www.buchreport.de/nachrichten/verlage/verlage_nachricht/datum/2012/02/17/wir-haben-nicht-abgemahnt.htm>, accessed 22.03.2014.

¹¹⁹ It should be noted that, being decided in 2002, this case was based on the Sammelrevers agreement and not the BuchPrG.

¹²⁰ G Streit and S Jung, ‘The Legal Framework for E-Books in Austria’ (2012) 1 (Special Issue on electronic books) International Business Law Journal, p. 366. Streit and Jung argued that a broad reading was supported by a teleological interpretation of the law, which aims at protecting the book as a cultural asset; since much of the same industry process goes into eBooks and print books, in order to preserve the market as a whole both industries must be covered by the protective cloak of fixed pricing. However, they ultimately conceded that without legislative intervention it would be for the Courts to decide whether the law applies or not, most likely through the attempted enforcement of it against eBook retailers.

concretised with the extension of the Austrian FBP law in November 2014 to mean that e-books, defined as ‘digital retrievable and storable book content that is made readable by suitable devices, in particular e-reader, tablets and smartphones’, are also now subject also to publisher set pricing.¹²¹ However, audio books are not covered by the FBP law.

In the Netherlands, a book is defined under the FBP Act as ‘a work that contains text that almost exclusively written in Dutch or Frisian language, has a title, consists of paper pages, whether or not accompanied by supporting information carriers, and is published in an edition of multiple copies for sale to final customers are intended.’¹²² The clear focus being on paper pages, the Dutch Minister for Education, Culture and Science commissioned a study in 2011 to determine the implications of fixed prices for e-books with a view to determining whether the law should be extended to cover e-books also.¹²³ This study, which ultimately concluded that such an extension should not take place, noted that defining the term ‘e-book’ was difficult:

“Defining e-books is much less straightforward than defining traditional printed books, with ‘paper’ being a useful element for the latter. By contrast, e-books lack this simple physical format, making it difficult to arrive at an unambiguous definition. At a time of transition, some link to physical books might provide an anchor point and e-books could be agreed to be the unchanged digital counterpart of printed books. However, interpretation problems arise when additional functionalities are mixed in, and a clear demarcation between e-books and other electronic services becomes tricky or even impossible as soon as functionalities become more sophisticated.”¹²⁴

V. CONCLUSION

There are several aspects of e-books that need to be considered when asking firstly what they are and secondly, how they can be distinguished from print books. With no physical embodiment, e-books are essentially collections of digital data: they do not look, smell or feel like print books, however even if *das Körperliche* (the medium) changes, *das Geistige* (the intellectual content) remains the same.¹²⁵

¹²¹ See Austrian Amendment to the FBP law: Änderung des Bundesgesetzes über die Preisbindung bei Büchern, BGBl. I Nr. 79/2014 of 21.II.2014.

¹²² Wet Op de Vaste Boekenprijen (‘Dutch Fbp Law’), Article 1.

¹²³ J Poort *et al.*, ‘Digitally Binding: Examining the Feasibility of Charging a Fixed Price for E-Books’ (2012).

¹²⁴ *Ibid*, p. 27.

¹²⁵ JG Fichte, *Proof of the Illegality of Reprinting: A Rationale and a Parable (Beweis Der Unrechtmäßigkeit Der Büchernachdrucks: Ein Raisonement Und Eine Parabel)* (1781).

This chapter has shown that there are several things we need to take into account throughout our consideration of e-books. The first is that we need to be careful when discussing e-books generically, as what you pay for and what you get access to is the result of the model; this may be based on subscription with automatic deletion of offline-accessible downloads after a certain time, it may be a streaming-based service whereby you never get access to the content without network coverage, or it may be download-to-‘own’, which – it turns out – is technically not ‘ownership’ but a ‘licence’, although recent developments have brought this categorisation closer to the former.

We have also looked at the core differences between print books and e-books: The hardware-software-content connection in the e-book environment means that choices of hardware and e-reader software ‘apps’, and their associated TPMs, influence the consumer’s later choice of book format and consequently their book retailer. The consumer purchase options are inherently more complex – leading to more restricted access – than was the case for print books. Additionally, although the Internet provides many more opportunities for cross border transactions, this is not as prevalent as one may have thought. Despite this, the opportunities are there for the Internet to open up non-national markets to consumers, particularly where e-books are concerned because these can be accessed instantaneously therefore removing considerations of shipping costs and time constraints.

Finally, we have seen that the definition of e-books for different types of legislation also tends to differ, a variance which is much less prominent when we are dealing with print books. The choice of the legislator as regards the definition is often unexplained, and risks being arbitrary – something our equal treatment framework proposes to resolve.

In short, this chapter draws mixed conclusions: e-Books are not print books, because they have certain important distinguishing features, but they are also not completely different from print books either. Their content is the same even if modes of access are different, and this can be reflected in the fact that both formats seem to have similar difficulties when it comes to increasing cross-border transactions because they are so linguistically and culturally centred. As such, the next chapter looks at building a framework to see what role equal treatment has to play in the context of our ‘same, but different’ books and e-books.

CHAPTER 3: A FRAMEWORK FOR EQUAL TREATMENT

I. INTRODUCTION

The goal of this chapter is to build a framework for a more consistent approach to the regulation of e-books that can be tested in the subsequent case studies. The chapter takes three interlinked steps to build this framework. In the first (Section I), we consider if existing rules have a place in new technology situations. Finding this to be the case, in the second step (Section II) we ask how we are to know when existing rules are to be applied (ie what should the standard for ‘likeness’ be), and in the third (Section III) we ponder the implementation of the rules, asking which type of equality we want and how we can get the rules to achieve this. While the first two steps are a discussion about the application of equal treatment (also referred to by some authors as ‘equivalence’ or ‘technology indifference’¹²⁶) which helps us decide what the rule should be, the third step is a question of technology neutrality (ie. how we are to implement the chosen rule in a technology neutral way).¹²⁷

The first ‘what rules’ step essentially asks whether existing rules suffice in new technology situations, or whether new rules are needed: This is a consideration of the preferred go-to statement of policy makers, that ‘what holds offline also holds online’. It is worth highlighting that this chapter our consideration is made principally using the terms ‘equality’ or ‘equal treatment’. This equality-terminology is used because in the context of that principle, the need for a *standard* for determining *when* things are equal (and therefore also when things should be treated alike or differently) is much clearer than is the case for discussions relating to technology regulation. Where the terms ‘equivalence’ or ‘technology indifference’ appear, often discussions about this standard are bypassed leaving the terms with an air of the theoretical as opposed to the force attributed to equality. An important step towards building a framework for deciding when e-books and print books should be treated alike (or differently) is in determining this standard so that the case study chapters can then attempt a practical application of

¹²⁶ Koops, Reed and Schellekens use the terminology ‘equivalence’ for what is referred to in this thesis as equality, for the reasons signalled below.

¹²⁷ Underlining the often dissatisfactory delineation between terminology, Reed says that:

“It is worth pointing out [...] that there is real potential for confusion between the principles of equivalence and technology neutrality [...]. For the purposes of this article, equivalence guides the law maker as to the principles of law which should apply to cyberspace activities and to some extent helps shape the substantive rules. Technology neutrality addresses the choice between the available substantive rules which could be used to implement those legal principles. In broad terms, technology neutrality means that the implementing rules should not favour or discriminate against a particular [...]. Sometimes the term technology neutrality is used to mean what I have described elsewhere as ‘technology indifference’, which attempts to define a rule in such a way that it applies equally well to the activity whatever technology is used to undertake it. This is broadly similar to the concept of formal equivalence explained below. More commonly, though, the term is used to describe a legislative aim that the rules should not discriminate between technologies and should continue to apply effectively even if new technologies are developed.” Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010), p. 249.

the framework. As such, in the coming section we attempt to address the open-endedness of the standard for equality by asking on what aspect we should judge situations as comparable: two situations may be comparable in many aspects of their appearance, their functionalities or their use; equally we may consider their likeness from the consumer perspective, or from the supply side.

The second ‘how do we make the rule work’ step is a question of the technology neutrality of the rules chosen in step one.¹²⁸ Here we must decide how the rules we have chosen in step one are to be implemented; for example, we could say that we wish to obtain a certain result (achieving outcome equality or what Reed refers to as ‘functional equivalence’) or alternatively that the same principles should apply across the board, even if the same results are not achieved. In making this choice, considerations such as avoiding hindering competition and the development of technology by favouring ‘winners’ and avoiding too frequent revision of the rules will play a role in determining how the rule is implemented across new and old technologies.¹²⁹ This section underlines that the best result is to achieve outcome (‘functional’) equality rather than just a formal application of the same rules. This means we need to understand how the functionalities of e-books impact upon the rule function. As such, an analysis of these differences must be built into each of our case studies. In order to achieve the same result, these impacts need to be neutralised by altering the way the rule is applied; if neutralisation is not possible then outcome equality cannot be achieved, even if it is required by the principle of equal treatment.

II. REGULATORY APPROACHES TO NEW TECHNOLOGIES: EXISTING RULES OR A BRAVE NEW WORLD?

The development of the Internet as a central medium for social and economic interaction alters the way existing rules function; as we have seen from Chapter 2 already, the move to transfers of book content via intangible file downloads has impacts on the way we can use this content. This brings consequences for our current rule set which was conceived primarily with physical transfers in mind; the impacts of technologies can result in different outcomes if we simply apply the same rules in the same way. However this does not mean that the existing rules are not a good starting point; as this section sets out to show, using knowns to decipher unknowns can be a useful regulatory technique.

¹²⁸ Winston J. Maxwell and M Bourreau, ‘Technology Neutrality in Internet, Telecoms and Data Protection Regulation’ (2015) 21 (1) *Computer and Telecommunications Law Review* 1.

¹²⁹ *Ibid*, 1.

Academic debates began in the early 90s to consider the significance of the Internet for our current rule-sets, with some advocating that this sphere should be treated as an ‘other’, a separate world with a separate functioning, deserving of different rules and signalling a break from traditional norms. These authors told of a place where the ‘law’ is not applicable, contributing to a school of thought became is known as ‘cyber-libertarianism’. This was led by the rallying cry of John Perry Barlow in his 1996 ‘Declaration of Independence of Cyberspace’:

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”¹³⁰

The mawkishness of this Declaration was underlined by the resounding sentiment amongst other cyber-libertarians such as Johnson and Post¹³¹ that governments, practiced in making laws for ‘real space’, could not effectively control ‘cyberspace’. Despite such critiques, governments nonetheless continued to act so as to bring the Internet under the scope of their law. In the US shortly after John Perry Barlow’s declaration, the Communications Decency Amendment Act was signed to restrict offensive speech on the Internet as a result of the ‘great cyberporn panic’¹³² and a year later, in 1997, EU Ministers signed the Bonn Declaration.¹³³ Quite in contrast to the assertions of prominent cyber-libertarians, it was:

“[S]tressed that the general legal frameworks should be applied on-line as they are off line. In view of the speed at which new technologies are developing, they will strive to frame regulations which are technology-neutral, whilst bearing in mind the need to avoid unnecessary regulation.”¹³⁴

The Ministerial Declaration reiterates the connectedness of offline (‘real world’) and

¹³⁰ JP Barlow (1996), ‘A Declaration of the Independence of Cyberspace’, Electronic Frontier Foundation, Davos, Switzerland. <<https://projects.eff.org/~barlow/Declaration-Final.html>>, accessed 21.09.2014.

¹³¹ DR Johnson and D Post, ‘Law and Borders – the Rise of Law in Cyberspace’ (1996) 48 (5) *Stanford Law Review* 1367.

¹³² For an amusing description of the origins of the ‘Great Cyberporn Panic’ see Chapter 9 in M Godwin, *Cyber Rights: Defending Free Speech in the Digital Age* (2nd, Massachusetts: MIT Press 2003). The original Act covered both obscenity and indecency, however the provisions on indecency were later removed as a consequence of a Supreme Court ruling was later struck down by the Supreme Court (see *Reno v American Civil Liberties Union (Actu)* [1997] 521 U.S. 844.; Lessig, *Code Version 2.0* (2006), p. 304.)

¹³³ M Schellekens, ‘What Holds Off-Line, Also Holds on-Line?’, in Bert-Jaap Koops et al. (Ed.), *Starting Points for ICT Regulation : Deconstructing Prevalent Policy One-Liners* (The Hague: TMC Asser Press 2006), pp. 51-52. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952275>, accessed 15.09.2013; Reed, *Making Laws for Cyberspace* (2012), p. 106.

¹³⁴ ‘Ministerial Declaration’, Document (1997), Global Information Networks Ministerial Conference, Bonn, 06-08.06.1997, Point 22. Available at: <http://www.echo.lu/bonn/final.html>.

online activities. But why is this the case? And why is it that now with e-books that existing rules are so often pinpointed as the starting point for treating new technologies, which might function very differently from traditional ones although at first they give the impression of being the same?

Quite aside from the radical standpoints of the cyber-libertarians that new technology should have a separate stand-alone regulation¹³⁵, the Ministers in Bonn, and regulators to this day, preferred to err on the side of caution when dealing with new technologies. This instinct can be explained rather simply by that fact that whereas academic authors may be free search for the best possible, most effective, solution for a given situation, rule-makers can never view the challenges of new technological impacts wholly apart from the surrounding regulatory traditions in which they operate. An early paper by Kohl points out that because ensuring stability and continuity is an inherent part of the nature of law itself, rather than seeking the 'best and most effective rules' for the regulation of the Internet regulators should instead look to locate solutions which fit with regulatory tradition and existing frameworks.¹³⁶ Kohl does not critique judges, or the legislature for that matter, for their rather more timid stances towards new regulatory questions but rather explains their reluctance for full-blown reform through the characteristics inherent in law itself. Each in their own way, judges and regulators are bound by their regulatory traditions and the desire to ensure the system is robust: As such,

'equivalence [...] is [also] important if the lawmaker wishes to take advantage of the normative force which those offline rules already possess. If the rule imposes a different set of obligations for cyberspace actors, then the fact that the authority of the cognate rule is accepted in the physical world is less likely to influence whether the cyberspace actor accepts the new rule's authority. Worse, lack of equivalence might persuade the cyberspace actor that the obligations of the new rule are meaningless for him; his expectation is that the rule in cyberspace will be the same as it is offline, and if it is not the same this throws doubt on the competence of the lawmaker.'¹³⁷

In other words, if existing norms can be translated into the new technology context,

¹³⁵ For example, according to John Perry Barlow "Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression . . . We will need to develop an entirely new set of methods as befits this entirely new set of circumstances". JP Barlow (1994), 'A Framework for Patents and Copyrights in the Digital Age. (Everything You Know About Intellectual Property Is Wrong.)', *Wired*, Issue 2.03 'The Economy of Ideas' (1994). <http://archive.wired.com/wired/archive/2.03/economy.ideas_pr.html>, accessed 19.09.2014.

¹³⁶ Kohl, 'Legal Reasoning and Legal Change in the Age of the Internet' (1999).

¹³⁷ Reed, *Making Laws for Cyberspace* (2012), p. 107.

rather than new ones being plucked out of thin air, then there is a stronger chance that they will be recognised and applied.

Picking up where the ‘cyber-libertarians’ left off, academics such as Lessig fortified the logic favoured by regulators that cyberspace¹³⁸ was not an ‘other’ and that ‘real world’ law and values continued to have an important role to play. Lessig’s work demonstrates that regulation is the pulling together of four ‘modalities’ – law, norms, architecture and markets – and is not pinned to one alone. How policies work is the effect of their ‘net regulation’ through these four modalities. In Lessig’s writing, it is apparent that the starting point for applying the four modalities is the existing regulation: ‘As in real space, then, these four modalities regulate cyberspace. The same balance exists.’¹³⁹ In this respect, Lessig quotes an earlier work by Mitchell, reiterating, that:

“Architecture, laws, and customs maintain and represent whatever balance has been struck in real space. As we construct and inhabit cyberspace communities, we will have to make and maintain similar bargains—though they will be embodied in software structures and electronic access controls rather than in architectural arrangements.”¹⁴⁰

It is from this basis that Lessig crafts his now well-known mantra that ‘code is law’:

“We can build, or architect, or *code* cyberspace to protect values that we believe are fundamental. Or we can build, or architect, or code cyberspace to allow those values to disappear. There is no middle ground. There is no choice that does not include some kind of building.”¹⁴¹

In Lessig’s view therefore, the existing rule is the foundation stone; it is pre-existing and in plain sight, but at some point we need to decide whether we want to build upon this

¹³⁸ This thesis is about conduct on the Internet, not conduct in Cyberspace. Although at times the terms are (mis)understood as interchangeable the difference is an important one. What happens on the Internet is an extension of our everyday, offline world – we make purchases on Amazon instead of going to a bookstore, make Skype calls instead of using the phone or rapping our neighbours door, or send emails instead of letters. The Internet makes life faster, easier, more convenient, but it does not create another, separate universe. Cyberspace, understood correctly, does just that. Cyberspace has room for improvement; it creates communities, interactions and norms that did not exist previously.

¹³⁹ Lessig, *Code Version 2.0* (2006), p. 125.

¹⁴⁰ Ibid.; William J. Mitchell, *City of Bits: Space, Place, and the Infobahn* (MIT Press 1996), p. 159.

¹⁴¹ Lessig, *Code Version 2.0* (2006), p. 6. Although Lessig’s ‘code is law’ mantra refers to the ability of code – not legal rules – to shape the Internet, he does not take the standpoint that legal rules are obsolete in the online environment. Rather, he talks the ability of both types of code (legal rules and computer code) to shape our social behaviour and the interactions this brings; because computer code shapes legal rules, we need rules that are reasonably adapted to the code and the new opportunities it offers. In other words, if legal rules are used to restrict code, the danger is that this will incite an instinct to dismiss those rules. Here, the key is in the appropriateness of rules. On this, see also C Reed, ‘How to Make Bad Law: Lessons from Cyberspace’ (2010) 23 (6) *The Modern Law Review* 903.

base or place a new foundation stone and build from it instead. The ability of regulators to use code to either preserve or alter traditional values in the new context still does not tell us anything about which choice should be made or when: the real trick is in determining when this translation is possible, in other words when the old and ‘new’ situations are sufficiently alike to warrant equal treatment. This is discussed in section II below.

Like Lessig, both Schellekens and Reed see existing law as a starting point which can lead to either the application of this law to the new situation, or to a break leading to a new law being produced. Schellekens observes that the statement ‘what holds offline, also holds online’ as stated by the EU Ministers can be taken to mean several different things. At the most basic level, the statement can be viewed in the context of cyber-libertarian proclamations about the free and unregulable Internet¹⁴²; it came as a clarification that by no means is it the case that *no* rules are applicable online. If this is the meaning, it does not go beyond a normative assertion that the online, new technology, situation is indeed subject to law.

Going a step further, when regulators default to existing rules to regulate the new situation, he observes that this could be done as a matter of policy, that policy being to remove blockages (including legal blockages) to the comparable treatment of comparable activities. If ‘what holds offline also holds online’ is being used as a policy statement, this does not necessarily mean that ‘there must never be a difference between online and offline law’, but rather that ‘those differences need to be kept as few as possible, and to be justified, if the policy is to have any meaning.’¹⁴³ However, there is nothing to guarantee when the statement is to be applied, or when a difference is justified; if this is a pure policy choice rather than a matter of principle, following the policy stance is always going to be a priority and is the simplest option because very little – if any – analysis of the likeness and difference between the two situations is necessary. If the policy is for the activity X, whether conducted offline or online to be subject to rule Z, then that is how it will be treated even if X^{offline} and X^{online} differ in a fundamental aspect for the purposes of applying the rule. With this formulation of ‘what holds offline also holds online’ there is also a problem in determining whether the ‘proposed implementation of the policy does in fact produce equivalent treatment between online and offline activities.’¹⁴⁴ As we have seen in Chapter 2, technologies bring certain impacts, allowing us to do more – or different – things with the content we get out hands

¹⁴² Schellekens, ‘What Holds Off-Line, Also Holds on-Line?’ (2006), p. 3.

¹⁴³ Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010), p. 254; Reed, *Making Laws for Cyberspace* (2012), p. 109.

¹⁴⁴ Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010), p. 254.

on. This means that the existing rules when applied to new situations may not in reality produce comparable results.

Another meaning of the mantra can be to designate a method for determining the correct categorisation of the law.¹⁴⁵ This would be close to a Court applying analogical reasoning to come to a decision about where a new situation fits within the existing law and the motivation for this approach is in line with the discussion above, which outlines that consistency with regulatory tradition is desirable and that looking to the old rule is a straightforward path to take: metaphors are, after all, a ‘shortcut to thinking’.¹⁴⁶ However, finding that ‘what holds offline also holds online’ results in the situation fitting into a particular category and requires an understanding of the constitutive elements of that category: it is only if these are present are to be found in both the old and new situation that analogy can bring about a resolution. Without this knowledge, saying the two are alike becomes a haphazard business. In addition, using the statement in this way leaves no scope for the rule to be amended to take into account impacts of the technology and to achieve equality of outcome: using ‘what holds offline also holds online’ as a method to determine the correct categorization brings with it the effect that once decided upon the same rule is set¹⁴⁷.

Lastly, Schellekens considers that ‘what holds off-line, also holds online’ could form a substantive guideline saying two things:

“(1) if off-line and on-line cases are equivalent, they must be dealt with similarly and (2) if they are not equivalent they must be dealt with differently to the extent of their inequivalence¹⁴⁸.”

This sounds very much like the Aristotelian formulation of equal treatment: Likes must be treated alike and differentials must be treated differently, unless objectively justified. However, if regulators are employing the starting point in this way, unfortunately it tells them very little at all. This is because, like for the other visions of ‘offline-online’ equivalence, without knowing how we are to judge their likeness there is nothing: The starting point is a blank slate.

The problem with all the explanations and ways of categorising the reasons for looking

¹⁴⁵ On the use of analogous reasoning generally see the recent contribution by Lamond, ‘Analogical Reasoning in the Common Law’ (2014).

¹⁴⁶ Section I above. WF Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press 2009).

¹⁴⁷ Reed, *Making Laws for Cyberspace* (2012), p. 114-115.

¹⁴⁸ Schellekens, ‘What Holds Off-Line, Also Holds on-Line?’ (2006), p. 5.

to existing rules is that they do nothing to clarify *when* the connection between the old and the new situation exists and when this connection is broken. While the above discussions might tell us something about the intentions of the legislator is using equivalence, we still don't know *in what circumstances* it is appropriate to employ the offline rule.

Unfortunately, for the most part any indication of this standard remains rather abstract in most academic works. The avoidance of this question can be explained by the diversity of regulatory contexts and techniques, which mean that the standard for deciding when the offline should be treated like the online is not regularised. While the choice of a standard will always be arbitrary, the point of the exercise undertaken in the next sections towards concretising the standard upon which we judge likeness and difference is to ensure that the line 'is being drawn in a systematic way, rather than leaving arguable cases to be decided on an ad hoc basis.'¹⁴⁹ It is this consistency that is currently lacking in the e-book context; avoiding it avoiding this brings the result that the mantra of 'what holds offline, also holds online when the online situation is equivalent' is rendered potentially meaningless. As with the cries for equal treatment in the context of e-books and physical books noted in the Introduction to this work, without a defined standard for equivalence, or equality, to apply, its effects can be just as arbitrary as would be the case if the starting point did not exist.

III. STEP TWO: THE STANDARD FOR DECIDING 'LIKENESS' OR 'DIFFERENCE'

Having looked at the contours of equality and having considered that equality needs a known standard for judging when things are alike or different, in this step we will add to the analysis above by considering what that standard might be. Once the standard is known, we will have the basis for our 'equality framework' for deciding when existing rules should apply to a new technology situation and when they might have no real place there.

I. *The Objective of the Rule*

Although Schellekens does not expand much on how we are to decide when equivalence might exist¹⁵⁰, he does seem to consider that the rationale for the rule, the 'interests,

¹⁴⁹ Lamond, 'Analogical Reasoning in the Common Law' (2014).

¹⁵⁰ Schellekens, 'What Holds Off-Line, Also Holds on-Line?' (2006), p. 14. Schellekens notes that various interpretative techniques might be employed to decide this, without considering any one preferable over the other. He notes that: "In the first place, one can resort to linguistic arguments: does the meaning of the words used allow that the new situation is subsumed under the rule? Is for example an electronic signature a signature? Secondly, systematic arguments may be brought forward, such as the comparable range of application, the comparable field of law, or the comparable underlying legal principles. Finally, teleological arguments can be put forward: are comparable goals to be met."

values, and principles involved and underlying the norm'¹⁵¹ are important for determining whether there is some capacity for translation or reusability in the online environment. Likewise, Lessig uses 'value translation' as his model approach for 'cyber activists in the future' to answer the question of when it is appropriate to preserve the traditional value. In his work, he outlines the long road taken in the US, at the legislative and judicial levels, that did eventually lead to the adoption of his favoured 'preservation by translation' approach.¹⁵² For this, it is necessary to know whether it is possible to translate the values inherent in the rules into the new technology situation; if not, quite simply 'we have nothing to be faithful to' and the existing rules do not (and should not) guide us.¹⁵³

Knowing the value underlying the rule is therefore key to the process of translation. In some situations this might be fairly clear, but in many more this is not so. Where there are latent ambiguities in the text of a rule, there is a need for judgment to be exercised and that judgment will always be open to criticism for the mere fact that the objective the rule seeks to attain could be interpreted otherwise. As such, although the pinpointing of the value we want to preserve is constitutive of the rule translation approach, it is also its greatest flaw.

A rule translation approach, which looks to the objective of the rule to see if it can be transferred, seems to be a sensible route to take because in the publishing context the culture being protected is contained within the book content, not the book as a physical item. What is referred to as 'book content' here is a specific expression of ideas in a particular *form*, the form chosen by the author and which cannot be appropriated or exploited by anyone else without the author's express opinion. The story, or the material contained within the work may be reformed and expressed by another author, but the specific form in which one author tells a story may not be replicated. Books have value not as physical objects (although this may be the case where they are bought to be displayed and not read) but as cultural vehicles of ideas and learning. According to the famous mantra of Marshall McLuhan, 'the medium is the message'.¹⁵⁴ This would mean that books and e-books are distinct because the medium alters the message. Where content is identical, this view is not shared by the present author. The reason for this

¹⁵¹ Ibid, p. 16.

¹⁵² Lessig, *Code Version 2.0* (2006), Chapter 9.

¹⁵³ Ibid, p. 156 and generally Chapter 159 on the US approach to the 'translation' of rules.

¹⁵⁴ Or the message, or the mass-age... See M McLuhan, *Understanding Media: The Extensions of Man* (MIT Press 1964); M McLuhan, *The Medium Is the Message: An Inventory of Effects* (London: Penguin 1967). Thanks to Dr Zsolt György Balogh (Corvinus University Budapest) for this note! For a study indicating the extent to which e-books as a medium alter the perception or absorption of content, see Kretzschmar *et al.*, 'Subjective Impressions Do Not Mirror Online Reading Effort: Concurrent Eeg-Eyetracking Evidence from the Reading of Books and Digital Media' (2013).

can perhaps be best explained with reference to Fichte¹⁵⁵: the embodiment of the idea (das Körperliche) does not matter and is not the object of special treatment (copyright). It is the book content – das Geistige – and not the book format that the value of ‘books’ attaches to; the medium is not therefore the message, and the message is the same whatever the medium.

It makes sense to try to apply the same protections to books and e-books, if their content is what is central to the objective of the rule in question. This is tested in the case studies in the following chapters by looking at different rules relating to ‘books’, seeing if we can extract their fundamental aspects, and then asking whether the objective of the rule translates to the new medium in order to determine if they should be treated equally.¹⁵⁶ If the objective of the traditional rule translates into the intangible environment, this tells us that we should be seeking to achieve the same outcome regardless of the format or medium.

As such, it is proposed that rule-objective or value-based approach, looking at what the rule seeks to protect and its translational capacity into the e-book environment seems well suited for attaining the consistency objectives of equality. If the objective of the rule does translate (i.e. if the value that is being protected is the same in both the physical and intangible contexts) then the standard for equal treatment is met. If it does not, equality still has something to say: the two mediums are ‘differents’ and so should consequently *not* be treated the same.¹⁵⁷

2. *An Alternative Standard: Comparable consumer use*

This section considers a different standard from the translatable rule-objective approach: Comparable consumer use. Here, we will focus on how case law particular to the area of VAT has addressed the question of when two goods or services must be treated equally for tax purposes. In doing so, we will also look at how the Court has compared printed books and physically embodied book content (on CDs, USBs, etc) in the *K Oy* case of September 2014. The two e-book specific rulings of the CJEU, *Commission v France* and *Commission v Luxembourg*, unfortunately do not shed any light on the question of

¹⁵⁵ Fichte, *Proof of the Illegality of Reprinting: A Rationale and a Parable (Beweis Der Unrechtmäßigkeit Der Büchernachdrucks: Ein Raisonement Und Eine Parabel)* (1781).

¹⁵⁶ The ‘central question is whether for the purposes of the rule, the on-line situation is equivalent to the off-line situation addressed in the rule.’ Schellekens, ‘What Holds Off-Line, Also Holds on-Line?’ (2006), p. 13.

¹⁵⁷ To be clear, the rule-objective does not mean the rule must function in the same way, but rather that outcome equality should be sought. Notably, if the purpose translates indicating equality is required but this but this cannot be achieved because of specific features of the new technology, this does not nullify the use of this standard; rather it means that the legislator may be objectively justified in applying a different rule.

neutrality between physical and intangible books¹⁵⁸, however we can gain a small glimpse at what the consumer perspective on books and e-books would look like based on the Penguin Random House¹⁵⁹ merger investigation by the Commission. Finally, taking stock of this section, we will consider what role this standard has to play in our analysis.

The EU VAT system has been, since 1992, a ‘dual rate’ system: The VAT Directive provides that MS shall apply a standard rate of VAT¹⁶⁰ and may apply either one or two reduced rates to the goods and services in the categories set out in Annex III to the Directive.¹⁶¹ The possibility for two or three different rates to exist within a single national VAT system provides fertile ground for the arbitrary treatment of goods or services. As such, the EU Court has had many opportunities to elaborate on the application of the principle of neutrality and this principle has been central to the functioning of the EU VAT system because of the close link between neutrality and competition: Differences in treatment affect competition and the functioning of the internal market.¹⁶²

Fiscal neutrality was developed by the CJEU to reflect, in VAT matters, the general principle of equal treatment. However, equal treatment is considered as a general principle and as such is self-standing; it transcends any specific provisions in legislation and applies in all situations as an omnipresent guarantee.¹⁶³ In contrast, fiscal neutrality is not an independent principle. Instead, it attaches to the specific provisions of the VAT Directive. In particular, Article 1(2) of that Directive provides for the application of a general tax on consumption applied to each transaction in a uniform way.¹⁶⁴ Neutrality is therefore ‘inherent in the common system of VAT’¹⁶⁵ and ‘requires that all economic activities should be treated in the same way.’¹⁶⁶ Despite not being a general

¹⁵⁸ Case C-479/13 *Commission v France (E-Books Reduced Rates)*; Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*. In these cases the neutrality argumentation of France and Luxembourg was dismissed because the CJEU asserted that neutrality could not be used to expand an Annex III category beyond the scope intended by the legislator, as noted in the next section.

¹⁵⁹ Case No COMP/M.6789 *Bertelsman/Pearson/Penguin Random House* [2013] Brussels, 05.04.2013 C(2013) 2038 final.

¹⁶⁰ Articles 96 and 97 VAT Directive; currently this may not be lower than 15%.

¹⁶¹ Article 98 VAT Directive. The background to the adoption of the dual rate system is outlined in more detail in Chapter 6, Sections I and II of this thesis.

¹⁶² P Rendahl, *Cross-Border Consumption Taxation of Digital Supplies* (Amsterdam: International Bureau of Fiscal Documentation (IBFD) 2008), p. 72 et al.

¹⁶³ Tridimas, *The General Principles of EU Law* (2006), Chapter 2.

¹⁶⁴ See for example the CJEU in B Terra and J Kajus, *A Guide to the European VAT Directives* 2 Vols. (Volume 1; Amsterdam: IBFD 2012), p. 79. Article 1(2): The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

¹⁶⁵ Case C-384/01 *Commission of the European Communities v France* [2003] ECR I-4395 [21-22].

¹⁶⁶ Case C-155/94 *Wellcome Trust v Commissioners of Customs & Excise* [1996] ECR I-3013, [38].

principle, the basis for both equality and neutrality in economic situations are tightly aligned because competition underpins both:

“If, in [the economic] field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market.”¹⁶⁷

- a. Fiscal Neutrality allows the selective application of reduced rates within a category of goods or services but cannot extend the scope of Annex III categories

The VAT Directive designates broad categories of goods and services that may be subject to reduced rates, which are listed in Annex III. However, this does not necessarily mean that the Annex III goods and services are all subject to reduced rates in all countries: Annex III does not oblige MS to apply reduced rates to ‘all aspects of a category of supplies covered by Annex [III].’¹⁶⁸ MS may choose to apply a reduced rate selectively within a specific category, ‘provided that no risk of distortion of competition results.’¹⁶⁹ As a consequence, the Court has held that:

“[T]he possibility granted to the Member States to apply selectively the reduced rate of VAT is subject to the twofold condition, first, that they isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, that they comply with the principle of fiscal neutrality.”

To be a ‘concrete and specific aspect’ of a category, the goods or services must be ‘identifiable separately from the other [goods or] services in that category.’¹⁷⁰ With respect to this first test, the Court has refused to take the economic or consumer perspectives into account in its own analysis, leaving it instead to the MS to apply the discretion the VAT Directive affords them to designate what concrete and specific aspects they wish to treat as separate, provided this applies general and objective criteria.¹⁷¹ Distinctions might be drawn based on ‘[t]echnical differences peculiar to the

¹⁶⁷ Case C-63/89 *Assurances du Crédit v Council and Commission* [1991] ECR I-1799.

¹⁶⁸ Joined Cases C-454/12 and C-455/12, *Pro Med Logistik GmbH (C-454/12) v Finanzamt Dresden-Süd, and Eckard Pongratz, Acting as the Receiver Appointed to Deal with the Bankruptcy of Karin Oertel (C-455/12) v Finanzamt Würzburg Mit Außenstelle Ochsenfurt* [2014] ECLI:EU:C:2014:111, judgment of 27.02.2014, [43].

¹⁶⁹ *Ibid.*

¹⁷⁰ Joined Cases C-454/12 and C-455/12, *Pro Med Logistik*, [44-45]; Opinion of Advocate General Mengozzi in Case C-213/13 *K Oy* [2014] ECLI:EU:C:2014:335, delivered on 14.05.2014, [17].

¹⁷¹ Case C-219/13 *K Oy* [2014] ECLI:EU:C:2014:2067, judgment of 11.09.2014, .

goods or services in question or objective differences in the use of the goods or services.¹⁷² For example, the ‘local transport of passengers by taxi’¹⁷³ may form a concrete and specific aspect of the category ‘transport of passengers and their accompanying luggage.’¹⁷⁴ Or, on a more morbid note, the ‘transportation of a body by vehicle’ may be a concrete and specific aspect of the ‘supply of services by undertakers’.

The neutrality argumentation forwarded by France and Luxembourg in the e-books cases against them was dismissed by the CJEU because there the principle was invoked in an attempt to expand the category of physically embodied books to also include e-books, despite the restriction of Article 98 (excluding ESS – which e-books are – from reduced rates) and the legislative intent not to include them within point 6 of the Annex.¹⁷⁵ In the *K Oy* case, the issue was rather whether digital audiobooks or texts on CD-Roms must – for neutrality reasons – be subject to a reduced rate where paper books are. Although the case did not include intangible e-books, the case is nonetheless helpful for determining how we are to test neutrality. Therein, Advocate General Mengozzi noted that:

“[I]t is perfectly possible to argue, as the German and Finnish Governments claim, that, unlike books on a paper support, books on other means of support all require a special technical device for reading and are therefore likely to constitute ‘concrete and specific aspects’ of the category of ‘supply of books on all physical means of support.’”¹⁷⁶

The Court in *K Oy* did not refer to the ‘concrete and specific aspect’ test, but from its subsequent analysis in the case it must be assumed that the Court did consider paper books to constitute a concrete and specific aspect of the broader category of ‘books on all physical means of support’. This being the case, it then fell to the court to analyse whether distinguishing the treatment of such books from others falling within the broader category could infringe the principle of fiscal neutrality.

¹⁷² Joined Cases C-454/12 and C-455/12, *Pro Med Logistik*, [47].

¹⁷³ Opinion of Advocate General Mengozzi in Case C-213/13 *K Oy*, [35].

¹⁷⁴ Joined Cases C-454/12 and C-455/12, *Pro Med Logistik*.

¹⁷⁵ “The principle of fiscal neutrality cannot extend the scope of reduced rates of VAT to the supply of electronic books [...] Point 6 of Annex III to the VAT Directive is not a provision which, unequivocally, extends the scope of reduced rates of VAT to the supply of electronic books. On the contrary [...] such a supply is not covered by that provision.” See Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [51]; Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [43]. This case is described in more detail in Chapter 6.

¹⁷⁶ Directive 2006/112/EC of the Council of 28 November 2006 on the Common System of Value Added Tax (‘VAT Directive’) OJ L347/1 of 11.12.2006, Annex III, Point 4.

b. A difference in treatment infringing fiscal neutrality

Once the court has established that the different treatments relate to particular aspects of the same broad category, it then goes on to establish if the principle of neutrality has been breached by treating these two aspects differently. The Court's approach to neutrality altered in 2011 with its ruling in the *Rank Group*¹⁷⁷, at which point it can be seen to move away from a competition based standard for deciding if neutrality was breached and towards a consumer based one.¹⁷⁸ In that case, the CJEU dismissed the claim of HMRC that differing treatment under the VAT legislation could not breach the principle of fiscal neutrality because 'there was no evidence that this difference in treatment had affected competition between those games.'¹⁷⁹ It ruled that for a breach of the principle of fiscal neutrality 'there need not exist competition or a distortion of distortion of competition between the services in question' for a difference in treatment be established. Rather, for neutrality to be required (meaning there must be no difference in treatment) the goods or services must: (i) be identical or similar from the point of view of the consumer; and (ii) meet the same needs of the consumer.¹⁸⁰ Differences in treatment can only therefore be upheld if the goods or services are not comparable from the average consumer's perspective, and where they meet different needs of the consumer.

In 2014 this was reformulated in the *Pro Med Logistik* case to provide that:

"Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other."¹⁸¹

In *K Oy* (the audio books case) the Court repeated the above paragraph and added that the relevant consumer outlook was that of a consumer in the Member State in question because:

"[T]he average consumer's assessment is liable to vary according to the different

¹⁷⁷ Joined Cases C-259/10 and C-260/10 *Commissioners for Her Majesty's Revenue and Customs v the Rank Group Plc* [2011] ECR I-10947.

¹⁷⁸ R de la Feria, 'VAT: A New Dawn for the Principle of Fiscal Neutrality?', Oxford University Center for Business Taxation, PP 11/04, Oxford.

¹⁷⁹ Joined Cases C-259/10 and C-260/10 *Rank Group*, [17]. For comment on the case see in particular R de la Feria, 'VAT: A New Dawn for the Principle of Fiscal Neutrality?' (2011).

¹⁸⁰ R de la Feria, 'VAT: A New Dawn for the Principle of Fiscal Neutrality?' (2011), pp. 6-7; Joined Cases C-259/10 and C-260/10 *Rank Group*, [59].

¹⁸¹ Joined Cases C-259/10 and C-260/10 *Rank Group*, para. 34.

degree of penetration of new technologies in each national market and the degree of access to the technical equipment enabling the consumer to make use of books published on physical supports other than paper.”¹⁸²

The analysis of whether neutrality is necessitated by the consumer’s perspective therefore falls on the national court to assess and is dynamic in nature, depending on the situation at a given moment. Relevant to the e-book situation also, Advocate General Mengozzi, cites the submissions of the German and Finnish governments that:

“[A]s regards books on CDs, CD-ROMs or USB keys, the average consumer will be influenced in his purchase by the additional search functions offered by such books or by the inclusion of software or other programmes in such books, unlike printed books.”¹⁸³

Following the Advocate General, the CJEU indicates that ‘the kind of support used, the content of the book in question or the technical properties of the physical support’ are ‘among the circumstances which the referring court will have to take into consideration’ when identifying whether or not the differences between them have a significant or tangible influence on the average consumer’s decision to choose one or other of those books’.¹⁸⁴

There seem to be two problems with using a consumer focused standard for deciding if regulation should be applied to physical and intangible books alike. The first is that deciding whether the average consumer considers e-books and print books as similar from a use perspective is an extremely difficult assessment to make in a quantifiable way: For some consumers, e-books are likely to be interchangeable, especially for those who are technology literate and have the necessary hardware and software to access e-book content. For others, e-books are simply out of the question. Even if the content is the same – and therefore whether it is read in print or digital form is irrelevant – due to the nature of e-books as dependent on technology the ability for (some) consumers to deem them comparable is controlled by their environment. How exactly a national court is supposed to go about assessing the consumer perspective remains the elephant in the room; this is particularly the case where – as for book content – consumers could come from all walks of life, age groups and backgrounds, although such an assessment may be less tricky where the product group in question is more targeted.

¹⁸² Joined Cases C-454/12 and C-455/12, *Pro Med Logistik*, para. 54.

¹⁸³ Opinion of Advocate General Mengozzi in Case C-213/13 *K Oy*, [57].

¹⁸⁴ Case C-219/13 *K Oy*, [31-33].

How might a national court go about finding if there is comparable use? It might choose to do so abstractly, by making general statements perhaps backed up existing studies or the submissions of the parties; this approach of course has its dangers. This seems to be the approach that has been used by the Finnish Supreme Court in the end for resolving the issue put to the CJEU in *K Oy*. Applying the guidance of the European Court, it found that from a consumer perspective print books and audio books or digital books on CD, CD-ROM or USB stick were not comparable because the latter required additional ‘technical aids’ to be used, and so under the principle of fiscal neutrality there was no need to apply the same rates.¹⁸⁵ Alternatively, a Court trying to apply the consumer standard may undertake a market test exercise with a cross-section of consumers, where an approach similar to the SSNIP test applied in merger control cases might be appropriate. With a view to determining whether two goods or services are sufficiently similar so as to cause consumers to switch upon a hypothetical price increase of 5-10%, this test allows for an assessment of the relevant market, starting from the narrowest possible market definition and then repeating the test until the consumer would no longer switch. In the e-book context, we already have an indication of what the outcome of this test could be – although, as noted above, this is likely to differ for each MS given the readiness of e-book uptake. The test has already been applied EU wide in the Random House merger assessment of the European Commission in 2012, which found that ‘the majority of responding customers consider that the vast majority of consumers would not switch from print books to e-books and vice-versa in case of a 5-10% increase in the retail price’ indicating that – although it left a precise market definition open – ‘print books and e-books may constitute separate product markets.’¹⁸⁶ In particular, consumers saw differences in terms of sales channels, retail pricing and the promotion of specific titles and the mode of consumption. Nonetheless it should be noted that in merger decisions the demand side perspective is not the only one to be taken into account; supply side views are also relevant to the Commission’s assessment.

Secondly, connected to the observation that establishing the average consumer perspective is a difficult task indeed, it also has to be noted that consumer perspectives are dynamic and will change according to, for example, the level of penetration of hardware or the increased incorporation of multimedia attributes that might distinguish e-books and print books. Embedding a decision based on a flowing consumer perspective cannot produce what Reed refers to as ‘meaningful’ law; if that perception

¹⁸⁵ Finnish Supreme Court, *Decision Applying K Oy Preliminary Reference* KHO: 2014: 199, decision of 31.12.2014. <<http://www.kho.fi/fi/index/paatoksia/vuosikirjapaatokset/vuosikirjapaatos/1419857247793.html>>, accessed 20.01.2015.

¹⁸⁶ Case No COMP/M.6789 *Bertelsman/Pearson/Penguin Random House*.

changes so does the basis for the rule.¹⁸⁷

Based on the above considerations, it seems more appropriate to use the first-proposed standard of the objective of the rule itself rather than indeterminate consumers as the hinge for deciding if print and e-books should be treated the same. This route is also likely to be more preferable for regulators because it minimises regulatory change. However, despite the noted problems with using a consumer based standard this is not to say that each of these approaches would not necessarily get us to different conclusions: Where the consumer finds tangible and intangible books to be the same because the desired use is gaining access to the knowledge contained therein, and the objective of the rule is based on the content of the book, it can be noted that the effect of using either approach would likely be the same.

IV. A TECHNOLOGY NEUTRAL FRAMEWORK TO ACHIEVE OUTCOME EQUALITY

Moving to build a framework to implement our rule-objective standard for determining likeness or difference, the first point to be made is that – as Reed highlights – finding the objective of the rule is a challenge in itself: ‘[W]hat the balance between [the] interests should be is assumed, but never stated, by the rules of law as they apply to the physical world.’¹⁸⁸ The objective of the rule may also be difficult to grasp because of the dual cultural and economic nature of the content industries: The rules in place aim to strike a balance between rightholders and consumers, and the national and EU law priorities. In addition, each of these factors may weigh out differently depending on the context to which the rule applies. The first step therefore has to be to understand the rules as they exist in the physical environment. From this, we can move to understanding what their objectives are. Once the objective of the existing rule is known, we then need to know whether this objective has a place in the new technology environment. In order to do so, we need to consider how that environment differs from the one for which the rule was originally conceived and, where possible, see how these differences have impacted on decision-making. The final step comes after a finding that the objective of the rule is translatable. The question then arises: *in what way* should the rules be applied to both the old and the new situation? This is essentially a question about the purpose of applying the equality framework: Are we looking to achieve formal or functional equivalence (equality of outcomes).

In short, in order to test how our rule-objective based formulation of equality would

¹⁸⁷ Reed, *Making Laws for Cyberspace* (2012).

¹⁸⁸ Ibid, p. 113.

look in practice, in each of our case studies we need to proceed along the following lines:

1. Look at the existing legal framework and how it applies to tangible and intangible books. This examination aims to set out the current status quo and to highlight which specific parts of the relevant legal frameworks ‘block’ their application to e-books. Here, it should be borne in mind that where blockages are intended by the legislator and incorporated into legislation, the role of Courts in instating equality may be limited; rather, achieving the equality our framework advocates would require an alteration of the framework and in the absence of judicial activism would fall back to the EU or legislatures.
2. Examine the objectives of the existing rule.
3. Examine the ‘translation’ capability of those objectives to the e-book situation; This allows us to determine if equality should apply and if the rule therefore has a place in the new technology scenario
4. Look at how the specific features of e-book alter the functioning of the rules and whether it is possible to ‘neutralise’ these impacts to achieve the same functionally the same outcome.

From our use of a rule-objective standard for deciding if equality should apply, the way we implement that rule should rather self-evidently ensure that the shared objective is attained. In other words, we are looking to apply the rules in a technology neutral manner with the purpose of achieving a functionally equivalent outcome for both the old and new situations. Functional equality, rather than formal or substantive equality is desirable because this takes account of the differences in the functionalities between different content formats and their modalities of access. It does not seek to simply have the same legal frameworks applied to both situations because such an approach would be unsuited to the new technology context. Purely transplanting existing laws would be – in most situations – a deceptive but easy get-around for regulators attempting ‘technology neutrality’. Although such an approach might give the pretence of equality, this is not really so: The new environment functions differently, so the outcome of the rules is different than is the case in the existing scenario.

Based on what we already know about e-books from Chapter 2, it is quite clear that they have different functionalities from print books; they might be more portable in the physical sense, but they might also be more restricted by DRM and interoperability constraints to limit their increased susceptibility to copying. Because technology brings certain impacts, applying exactly the same rules in exactly the same way to e-books as to print books (i.e. going down a the route of formal equality) might not necessarily bring the same results. This is recognised throughout the literature on offline-online

equivalence as examined above, which encourages instead a more functional approach that recognises the workings of the rule may have to change if the same result is to be achieved. Reed observes that in regulatory contexts:

‘The most common way of using the principle [of offline-online equivalence] seems to be to lay down general principles of law, and then to create specific rule-sets to deal with the particular difficulties which arise online in an attempt to achieve functional equivalence.’¹⁸⁹

Both Reed and Schellekens outline several occasions in which this approach has been undertaken at the EU level, for example with the adoption of the e-Signatures Directive.¹⁹⁰ Reed divides laws into those regulating mental states of actors and those addressing behaviours. The former translate relatively well into new technology environments because the intention – the mental state of the participants – is key to undertaking the activity and this remains so even after the transition.¹⁹¹ Where the rule is intended to achieve specific outcomes (i.e. it mandates a particular behaviour) the translation of the rule is more tricky because technology enables actors to do more, and different, things with content they come into contact with. Here, we need to take into account the changes that technology brings and attempt to neutralise these impacts; equivalence in this context is much less likely to be achieved by a pure translation approach because simply applying the same rule would not take into account these new possibilities for alternative behaviours. This does not mean that equivalence is not possible, but rather that the differences between undertaking the activities in the offline and online must be understood and taken into account.

More recently and more relevant to the subject of this thesis, is the *UsedSoft* decision of the Court. This ruling tells us that where new methods of transmitting content are sufficiently alike traditional (physical) transfers, equal treatment should ensure the same *outcome* is achieved:

¹⁸⁹ Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010), p. 251.

¹⁹⁰ In the example of the e-signatures, Directive 1999/93/EC on a Community framework for electronic signatures ([2000] OJ L13/12) established a legal framework whereby electronic signatures were to be legally equivalent to an ink signature. However, this involved several burdensome steps (special technology, identity certificates), far more burdensome than the scribble of a pen on paper, before the e-signature would be legally recognised. Reed concludes that: “The lesson to be drawn here is that an attempt to achieve functional equivalence must not consider just the purely legal effects of a rule. It must also encompass the effects of the rule on the wider environment in which the activity is undertaken.” Ibid, p. 252. Reed, ‘How to Make Bad Law: Lessons from Cyberspace’ (2010). For further discussions about the e-signatures directive see also B-J Koops, ‘Should ICT Regulation Be Technology-Neutral?’, in Bert-Jaap Koops et al. (Ed.), *Starting Points for ICT Regulation : Deconstructing Prevalent Policy One-Liners* (The Hague: TMC Asser Press 2006). <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952275>, accessed 15.09.2013.

¹⁹¹ In our case studies, an example of intention being important is in the application of the ‘circumvention rule’ in the context of fixed book pricing.

“The on-line transmission method is the functional equivalent of the supply of a material medium. Interpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment confirms that the exhaustion of the distribution right under that provision takes effect after the first sale in the European Union of a copy of a computer program by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of the program.”¹⁹²

This is demonstrated by the Court through the path it chooses to resolve the case: It recognises the impacts that intangible content delivery have on the way the exhaustion doctrine functions. Understanding the impacts of digital technologies thus relevant for the purpose of determining the ‘reusability’ of existing rules in new situations. Where the impacts are significant enough so as to affect the way the rule functions – meaning that applying the rule in the same way would achieve a different result—we need to look in more detail so as to see if it is possible to ‘neutralise’ these effects by adapting the internal workings of the rule. If we simply apply the same rules in the same way, but the functioning of the technology differs, the law could be rendered meaningless.¹⁹³

The reasoning of the Court in *UsedSoft* is not unique. Examples of equal treatment of outcomes have been integrated into EU law in other areas where technology have impacted upon the way we carry out what were once offline-only tasks: e-signatures, private copying and the provisions of the AVMS Directive applying to on-demand content can all be seen as attempts at making sure regulation has the same effect in the new technology enabled and traditional situations. The motivation is to avoid consumers having to make a ‘complex mental switch’¹⁹⁴. If a completely different set of rules applied online as compared to offline, the ‘normative confusion’¹⁹⁵ may lead to excuses for breaking the law, or may drag e-commerce and digital services behind traditional outlets because of uncertainty as to which rules apply. In this regard, it can be noted that the problems with VAT and exhaustion addressed in this thesis arise because the regulation is technology-restricted: the provisions cannot be simply transferred without legislative intervention.

¹⁹² Case C-128/11 *Usedsoft*, [61].

¹⁹³ Reed, *Making Laws for Cyberspace* (2012), p. 105.

¹⁹⁴ Reed, ‘Online and Offline Equivalence: Aspiration and Achievement’ (2010), p. 253.

¹⁹⁵ A Nicholson (2013), ‘Old Habits Die Hard?: *Usedsoft v Oracle*’, SCRIPTed, 10 (3), published online 07.10.13, pp. 389-408. <<http://script-ed.org/?p=1167>>, accessed 9/10/13. TM Cook, ‘Exhaustion – a Casualty of the Borderless Digital Era’, in Lionel Bently, Uma Suthersanen, and Paul Torremans (Ed.), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010), p. 361-363 citing the work of P Ganeva (2006), ‘Exhaustion of IP Rights: Reflections from Economic Theory’, IIR WP #2006-2002.

To achieve functional equality, a further step is needed that goes beyond simply saying that the same rules should apply. This is an ‘compensation’ step, whereby it is necessary to look at the functioning of the rules in context as affected by the new technology and how we might be able account for these differences within the rule to achieve an equal outcome. More difficult to assess is how the balance of interests is altered by these and how this affects our quest for functional equivalence. For example, in the copyright context intangible content means that ‘balances are entirely skewed from the offline by easy copying, easy distribution, anonymity [etc].’¹⁹⁶ One way of neutralising these effects in the exhaustion context would be to require the use of forward and delete technologies. However, in doing this we are putting an additional burden on consumers that does not exist in the physical sales environment. The case studies used in this thesis serve to demonstrate the differences in impact that the intangible environment can have depending on the legal rule we are dealing with, as well as the extent to which compensation for these impacts needs to be ‘built-in’ to the rules to achieve functional equality. Where this type of equality is achieved, the effect of the rule should be the same, however this may still mean that the obligations imposed on those subject to the rule may vary.

V. CONCLUSION

From this Chapter, we have considered all the constituent elements for building a framework to judge likeness or difference and determining whether the existing rules are fit to be applied in the e-book context: This determination should be made on the basis of the objective of the existing rule, meaning that if this translates into the new technology context then the existing rules should be applied. Finding the value underlying the rule is now the tricky part and to this end, the next Chapter looks to balance between EU law and national law in each of our case studies by way of introduction to the specific examination of each rule in Chapters 5, 6 and 7.

Once we know the value being preserved, as noted in the above section, we must then consider how the new technology affects the way the rule functions and how to neutralise those effects so that functionally the same outcome can be achieved. This exercise is undertaken for each case study in Chapters 5,6 and 7, because the way the technology affects the rules differs depending on the critical elements for those rules.

Two final points remain to be said about the appropriate context to make the choices the framework requires. Firstly, we can question whether a passive approach should be

¹⁹⁶ L Edwards (2011), ‘Regulating Cyberspace: Can Online Ever Equal Offline?’ (Jotwell Blog blog), posted <<http://cyber.jotwell.com/regulating-cyberspace-can-online-ever-equal-offline/>> accessed 12/11/2014.

taken by Courts, leaving the choice to the legislature because the ‘newness’ of new technology questions ‘makes them feel political’¹⁹⁷, or whether a more active approach translating the rule into a situation possibly unforeseen by the legal framework should be preferred. These are questions the answers to which are specific to the case study at hand. In the case studies used for this work, already hints are appearing that in the EU context the European Court is at the forefront of decision-making, while the legislature drags its heels in search of agreement on the way to move legal frameworks forward.¹⁹⁸ However, although the Court may be called upon to give answers to questions far sooner than the legislature may get round to discussing questions this does not necessarily mean that the Court will answer those questions in a way that evolves the legal framework. Demonstrative of this are the rulings of the CJEU in the *Commission v France* and *Commission v Luxembourg* cases relating to reduced rates of VAT for e-books which landed with a rather dull thud. In these rulings the CJEU went no further than applying the existing VAT framework – which was, after all, agreed upon by the MS – and thereby avoided any cries of judicial activism. Despite this, quite the opposite could be said of the CJEU’s *UsedSoft* ruling where a distinct modicum of creativity – with reference to equal treatment, it might be added – was inserted into the judgment so as to read the Computer Programs Directive as applying to both tangibles and intangibles.

Secondly, what can be said about the level of the decision; is this to be made in the national or the broader EU setting? The answer to this question also comes from the context of the case studies themselves; as the next Chapter sets out to demonstrate, the interaction between the EU and national levels varies depending on the balance of harmonisation and negative integration that has taken place. Our choice of case studies covers the full spectrum in this regard; from harmonised copyright exhaustion to national policy choices – although always restrained by EU law – in the context of FBP. It is to a deeper examination of this interaction between EU law and national cultural policy that we will now turn.

¹⁹⁷ Lessig, *Code Version 2.0* (2006), p. 167.

¹⁹⁸ As a side, it is interesting to note that the US situation appears to be taking the opposite direction; in *Redigi* the Court refused to interpret the first sale doctrine as applying also to downloaded content, finding that ‘It is left to Congress, and not this Court, to deem [the statutes] outmoded.’ Case C-128/11 *Usedsoft*, p. 13; United States District Court Southern District of New York *Capitol Records LLC v Redigi Inc* [2013] No 12 CIV 95 (RJS).

CHAPTER 4: GETTING THE STARTING POINT RIGHT: NATIONAL HORSES IN EU COURSES

INTRODUCTION

This chapter examines the regulatory frameworks for print books that, following on from the previous chapter, are used as starting points for our equality analysis. Books are of dual economic and cultural value, meaning that an understanding of the inter-relation between fundamentally economic aims of EU law and national approaches to culture becomes necessary to appreciate that it is as a result of a balance between these often conflicting sources that the rules applying to the publishing sector have developed.

Although culture is noted in the Treaty, there is no such thing as an explicit ‘book policy’ at the EU level. While such policies do exist nationally – VAT and FBP are two such examples – or may have been adopted transnationally as in the early days of FBP by trade agreement, the role of the EU in the field of culture remains as complementary to national policies (contributing to the ‘flowering’, ‘supporting and supplementing’) and negative integration achieved by applying free movement principles rather than imposition through positive integration. Although an explicit policy does not exist, the EU has nonetheless framed national cultural policies in a number of ways: for example, through structural funds, cross-cutting policies and case law. What would seem to be national cultural decisions subject to subsidiarity have, over time, been eked out through this negative integration, and the focus of this chapter is to examine the extent to which this is the case.

This interaction does not vanish where digital subject matter is concerned and understanding how national and EU laws interact is just as important in the digital context as in the print one. This chapter brings the message that despite the digital evolution, we cannot question the basis for MS cultural policies any more than we could for the print sector. What may be the case, however, is that the nature of the digital environment enables EU law to encroach on such policies because book content can be used in new ways and crossing borders more easily, which implies therefore the application of EU law.

The aim of section 1 of this chapter is to underline why this thesis does not set out to question the efficacy of particular MS policy decisions relating to books. This is because in the EU framework there is no such thing as a ‘European cultural policy’; although culture has undoubtedly become part of the European law landscape, harmonisation in

this area would not only conflict with the principle of subsidiarity¹⁹⁹, but would also be extremely difficult to achieve given the vastly polarized MS approaches. As such, taking the hint from past experiences with the print sector that say cultural policies should be left intact, this thesis puts aside any questions of whether these actually achieve the objectives they set out to. Instead, each choice of MS standpoint is taken as a given: whichever conception of copyright is used by the MS, or whether FBP or reduced VAT rates are in use, this work does not protest that national decision for the print sector. Recognising that cultural differences are often insurmountable – and that such diversity is not necessarily a bad thing – this work takes the viewpoint that the varied national approaches are to be given the benefit of the doubt: ‘Cultural policies are horses for courses, and not one size fits all.’²⁰⁰

However, this flaws-and-all approach to national policy choices is not absolute. National approaches must nonetheless be in line with EU law before they can be taken as a starting point. Section 2 hones in on the areas chosen for our case studies to serve a twofold purpose: Firstly, it provides a basic introduction to the subjects of VAT, copyright and fixed book pricing; secondly, it shows how national and EU rules have interacted in these areas, resulting in clipping and re-framing so that national and EU interests are balanced. This balancing is necessary because, although the EU lacks competence over cultural policy, national rules may nonetheless impede the functioning of the internal market. Setting out the workings of this interaction already in the context of our case studies also serves as a backdrop for the following three chapters, where the existing rule-set is tested for translation into the e-book environment.

This chapter does not set out the specific objectives of VAT, exhaustion or FBP; these objectives instead are to be found in the second section of each of the individual case study chapters. These chapters also contain, in their sections on legal frameworks, an overview of how the different implementations of each topic vary between MS.

I. NATIONAL CULTURAL POLICIES AND THE EU

“The historian Gaetano Salvemini in his 1936 critique of the ideology of Italian Fascism observed that locating it was rather like looking in a darkened room for a black cat that was

¹⁹⁹ Article 5(3) TEU: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the MS, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

²⁰⁰ MD Appelman and MFM Canoy, ‘Horses for Courses – Why Europe Should Not Harmonise Its Book Policies’ (2002) 150 (5) De Economist.

*not there. Identifying any coherent policy principles in the European Union (EU) with regard to ‘culture’ can seem a similarly futile assignment.*²⁰¹

This section looks at the EU competence in the field of culture, starting from the early case law through to the adoption of the ‘cultural clause’ of (now) Article 167 TFEU to the present day ‘economic growth-creation’ approach to culture. The purpose is to show that an EU-wide conception of ‘culture’ is elusive, as noted by Gordon in the quote above, and – although EU involvement in the field is not uncommon – a policy-setting agenda towards harmonisation is not explicitly present even it may be implicitly so. When it comes to cultural policy, this remains in the remit of the MS.

1. *Early EU dalliances with culture*

The European project that was initially embarked upon in the post-war period was one of economic (re)construction rather endeavouring to have an impact on culture. The 1951 European Coal and Steel Community Treaty and the 1957 Rome Treaty establishing the European Economic Community did not contain any provision externalising the competence of the MS in this area.²⁰² However, although these Treaties were not ‘intended to be “about” culture’²⁰³, neither did they exclude culture from their scope.

A specific role for the EU in the cultural sphere did not appear in the Treaty until 1993, but still the relationship between culture and European integration has been venerable and discreetly present throughout the existence of Europe as a Union.²⁰⁴ In 1968 that the CJEU first confirmed that items of cultural value could come within the scope of the Treaty and therefore be subject to the EU internal market rules. As noted in Chapter 2, in *Italian Art Treasures*²⁰⁵ the CJEU found that despite the cultural nature of artworks in question, they were still tradable goods for the purposes of the Treaty that therefore fell within the scope what is now Article 34 TFEU. After this ruling, ‘it became abundantly clear to national authorities that attempts to escape their Internal Market obligations on the basis of protectionist cultural arguments would not be successful.’²⁰⁶

²⁰¹ C Gordon, ‘Great Expectations – the European Union and Cultural Policy: Fact or Fiction?’ (2010) 16 (2) *International Journal of Cultural Policy* 101, p. 101.

²⁰² This is not to say that culture gained no mention in the EEC Treaty; Article 36 EEC (now Article 36 TFEU) incorporated the protection of ‘national treasures’ and Article 131 EEC promoted cultural development with third countries (now Article 167(3) TFEU).

²⁰³ R Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’, in Paul Craig and Gráinne de Búrca (Ed.), *The Evolution of EU Law* (Oxford: Oxford University Press 2011), p. 870.

²⁰⁴ E Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Leiden, The Netherlands: Martinus Nijhoff Publishers 2008), Chapter 1.

²⁰⁵ Case 7/68 *Commission v Italy (First Art Treasures)* [1968] ECR 423, p. 428.

²⁰⁶ E Psychogiopoulou, ‘Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?’ (2006) 12 (5) *European Law Journal* 575, p. 580.

The clarity of the Court's outputs but lack of any basis for direct EU policy action meant that the relation between EU law and culture was from the beginning a careful exercise in spontaneous wing-clipping of national laws. In this first 'phase' of EU integration, influence cultural policy was not a clear priority because of the principally economic aims of integration, to which culture was deemed peripheral. As Craufurd-Smith notes, '[s]erious conflict between the Member States and the EEC in cultural affairs would initially [...] have seemed quite distant'²⁰⁷ therefore removing any immediacy to include culture at the political level. However, some authors do feel that 'the Community organs could be said to have had an implicit cultural agenda from the very start' because influencing culture was necessary for both building trust in the EU project (and conversely defeating scepticism) and ensuring that the internal market could function effectively.²⁰⁸

2. Enter the 'cultural industries'

Whether intended or incidental, the progression of EU law into the cultural sphere grew in the 'second stage' of European integration, from 1975 to the signing of the Maastricht Treaty.²⁰⁹ During this phase, the terminology of the 'cultural sector'²¹⁰ first started to appear.²¹¹ The entrance of this term is important because 'culture' alone could be taken in two different ways: It could refer to cultural outputs (e.g. music, art or literature) or to the underpinnings that make up a society as distinct from another group.²¹² 'The cultural sector' term is synonymous with the term 'cultural industries' which equally refers to those sectors having culture as a commercial output: publishing, but also film, broadcasting, music and more recently video games fall within this terminology.²¹³ As a point of contrast, although this division is by no means clearly articulated in literature, the term 'creative industries' seems to be broader, subsuming the content and cultural

²⁰⁷ Craufurd Smith, 'The Evolution of Cultural Policy in the European Union' (2011), p. 871.

²⁰⁸ Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008), p. 7.

²⁰⁹ RJ Neuwirth, 'The Culture Industries: From the Common Market to a Common Sense', in David Ward (Ed.), *The European Union and the Culture Industries Regulation and the Public Interest* (Aldershot, UK: Ashgate 2008), p. 246.

²¹⁰ The 'cultural sector' refers to the former aspect of culture, and is described in terms of a 'socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and products.' See European Commission, 'Community action in the cultural sector' (Communication), EC Bulletin Supp 6/77, as cited *ibid*, p. 247.

²¹¹ R Craufurd Smith, *Culture and European Union Law* (Oxford; New York: Oxford University Press 2004), Chapter 2; A Littoz-Monnet, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012) 34 (5) *Journal of European Integration* 505, p. 511.; Neuwirth, 'The Culture Industries: From the Common Market to a Common Sense' (2008), p. 247; Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008), p. 30.

²¹² Such industries are also referred to within the reference group of 'content industries' or as the 'content sector'; essentially these terms can be used to cover those industries that operate through the 'commercial exploitation through active licensing of intellectual property rights (copyright)'. I Katsirea, *Cultural Diversity and European Integration in Conflict and in Harmony* (Athens: Sakkoula 2001), Chapter 1.

²¹³ Technology Strategy Board, 'Creative Industries Technology Strategy 2009-2012'. <http://webarchive.nationalarchives.gov.uk/20130221185318/http://www.innovateuk.org/_assets/pdf/creative%20industries%20strategy.pdf>, accessed 10.10.14.

sectors.²¹⁴ For example the UK ‘Creative Industry Strategy’ also includes architecture, media and advertising, social media, design and antiques.²¹⁵ It can therefore be said that the creative sectors produce intellectual property that might be traded by the cultural or content sectors.

With the introduction of the terminology of the ‘cultural sector’ or ‘cultural industries’ came the clear policy indication that the Commission sought to ameliorate trade conditions and economic value rather than altering national approaches (providing they were compatible with EU law) and replacing them with a harmonised EU culture.²¹⁶ The Commission was aiming to exert caution in this respect, taking care to ensure that its ideas did not go so far as constituting a ‘cultural policy’ per se. During this time, the European Parliament was more active in both increasing the budgetary support for cultural activities and calling for resolutions on cultural measures to be adopted.²¹⁷

Looking behind the rhetoric, as Craufurd Smith suggests, clearly demonstrates that the EU institutions at all levels were in reality influencing the field of culture even without the foundations for this involvement being made clear. However, as a result of both legal and political movements, the interaction between EU law and culture continued to evolve over time to become more openly active:

“Legal because increasing prosperity led to an expansion in trade in cultural goods and services and, inevitably, to conflicts between domestic measures and EU law. Political because the cultural allegiances that Europeans feel from their home states, nations, or regions can create barriers not only to European trade but also for the development of a European identity and support for the challenging process of European integration.”²¹⁸

²¹⁴ Littoz-Monnet, ‘Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy’ (2012), p. 513. This seems to be a later addition to politician’s vocabulary, with authors accrediting Tony Blair’s New Labour with the shift upon his formation of the ‘Creative Industries Task Force’ in 1997-1998.

²¹⁵ UK Government (2013), ‘UK Creative Industries – International Strategy: Driving Global Growth for the UK Creative Industries’, Department of Trade And Investment, London, 30.06.2014. <http://www.thecreativeindustries.co.uk/media/252528/ukti_creative_industries_action_plan_aw_rev_3-o_spreads.pdf>, accessed 10.10.14.

²¹⁶ Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ (2011); Neuwirth, ‘The Culture Industries: From the Common Market to a Common Sense’ (2008), p. 247.

²¹⁷ Generally see Craufurd Smith, *Culture and European Union Law* (2004), pp. 25-26. Regards books, see European Parliament (1981), ‘Resolution of 13 February 1981 on the Fixing of Book Prices’, OJ C 50/102; European Parliament (1987), ‘Resolution of 12 March 1987 on the Fixing of Book Prices’, OJ C 99/172; European Parliament (1987), ‘Resolution of 10 July 1987 on the Communication from the Commission to the Council on the European Dimension with Regard to Books’, OJ C 246/136; European Parliament, ‘Resolution of 21 January 1993 on the Promotion of Books and Reading in Europe’ (1993).

²¹⁸ Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ (2011), p. 871.

Towards the end of the 1980s, the focus of the Commission with respect to culture fluctuated; on the one hand, it remained concerned with trade and the economic value of the sector, realised by market integration, but on the other it sought to promote a 'European' identity beyond, but not replacing, the national identities of those living within the Union as a matter of political necessity for the advancement of the European project.²¹⁹ However, there was still no basis or direction written into EU primary law as to what the balance of EU initiatives with national concerns should be. As noted by Psychogiopoulou, this situation was fraught with difficulties:

“The fact that, through market and policy integration, the European institutions were operating a de facto cultural policy, without any explicit competence to do so, sparked strong criticism in those Member States, which saw the economic-driven – even if culture-oriented – Community action as an attempt to erode domestic cultural powers.”²²⁰

To counter this erosion, the instalment of 'a clause confirming that 'cultural policy' was subject to EU subsidiarity rules' was called for.²²¹

3. *The 'cultural mainstreaming' clause of Article 167 TFEU*

It was only with the Maastricht Treaty in 1992 that a 'cultural article' was formally incorporated into the Treaty. Certain provisions of the Treaty now oblige the EU to take national cultures into account – an example of this is Article 107(3)(d) ('aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest').²²²

The somewhat poetically worded (now) Article 167 TFEU, provides that:

“1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

²¹⁹ European Commission (1987), 'A Fresh Boost for Culture in the European Community', COM (87) 603 final, Brussels, 14.12.87; Littoz-Monnet, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012), p. 509.

²²⁰ Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008), p. 22.

²²¹ Gordon, 'Great Expectations – the European Union and Cultural Policy: Fact or Fiction?' (2010), p. 105.

²²² Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008).

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
 - conservation and safeguarding of cultural heritage of European significance,
 - non-commercial cultural exchanges,
 - artistic and literary creation, including in the audio-visual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
 4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
 5. In order to contribute to the achievement of the objectives referred to in this Article:
 - the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
 - the Council, on a proposal from the Commission, shall adopt recommendations.”

The poetics of paragraph (1) aside, this remains an uneasy provision both in substance and scope. It does not remove all power from the EU to take action in the cultural sphere, but clearly emphasizes with the word ‘contribute’ that the focal point of cultural policy will remain inside the MS. Paragraphs 1 to 3 set out a basis upon which the EU can become involved in cultural policy in an active way. This opportunity has been embraced through the development of expansive Action Programmes and Structural Funds.²²³ The ‘common cultural heritage’ of which it speaks is also ambiguous; it replaced a reference to the ‘European identity and the European cultural dimension’ in an original draft, but some would argue that there is no such thing within the EU and so to bring something that does not exist to the fore represents a drafting tactic to enable a wide berth for EU intervention.²²⁴ A less critical reading may simply reason that there is no definition of ‘culture’, due to its ever-fluctuating nature and that as such no more specificity is required within the article.

²²³ See generally European Commission ‘DG Education and Culture’, <http://ec.europa.eu/dgs/education_culture/index_en.htm>, accessed 18.09.2014. Craufurd Smith, *Culture and European Union Law* (2004), pp. 65-68; Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ (2011).

²²⁴ Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008), p. 29 and literature cited therein.

From reading the Article alone, it is paragraph 4 that seems to be the most significant paragraph.²²⁵ This is known as the ‘flanking’²²⁶, ‘cross-sectional’, ‘cultural’ or ‘policy-linking cultural’ clause.²²⁷ It brings the consequence that ‘cultural considerations acquire a horizontal dimension, assuming the status of a cross-cutting concern to be reflected in overall Community practice.’²²⁸ Put like this, culture would seem to have developed to be a rather expansive way of keeping EU action in check.

However, despite appearances, the effects of Article 167 have remained limited and the seeming expansiveness of this provision has not been readily endorsed CJEU. The *Libro* case, which concerned the Austrian fixed book pricing law, provides perhaps the most resounding rejection of the ability of Article 167 to justify national cultural measures restricting intra-EU trade²²⁹. In this case made the finding that had come already in *Leclerc*, that books cannot benefit from the Article 36 TFEU justification for ‘the protection of national treasures possessing artistic, historic or archaeological value’²³⁰, but also that provided that

“Article [167 TFEU] which provides a framework for the activity of the European Community in the field of culture cannot be invoked, as was observed by the Advocate-General, as a provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade.”²³¹

As will become clearer in Section II.3 below, the impact of the cultural clause has been on the one hand to implicitly reinforce national cultural differences, while on the other driving harmonisation efforts particularly in the field of copyright.²³²

²²⁵ The second part of this paragraph (‘in particular in order to respect and to promote the diversity of its cultures’) was not introduced until the 1997 Amsterdam Treaty (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts - Contents (‘Amsterdam Treaty’) OJ C340/1.. The Maastricht Treaty version of 128(4) read “4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty.” Treaty on European Union (‘Maastricht Treaty’) OJ C191/1.

²²⁶ SA De Vries, *Tensions within the Internal Market : The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Groningen: Europa Law Publishing 2006).

²²⁷ Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008), p. 26.

²²⁸ Ibid.

²²⁹ C-531/07 *Fachverband Der Buch- Und Medienwirtschaft v Libro Handelsgesellschaft MbH* [2009] ECR I-3717, [33].

²³⁰ Ibid, [32]; Case 229/83 *Leclerc v Au Blé Vert* [1985] ECR I, [30].

²³¹ C-531/07 *Libro*, [33].

²³² V Kitz, ‘The Difference between Books and Chocolate Bars - How EC Treaty Art. 151(4) Affects Community Actions’ (2004) 32 (3) *AIPLA Quarterly Journal* 361.

4. *Continuing EU focus on the economics of culture*

Since the Maastricht Treaty, despite there being an EU competence in the field of culture, the principle of subsidiarity has continued to mean that EU action has been limited in scope and in scale. DG Culture has continued to frame intervention in terms of maximising the economic worth of the sector, as demonstrated by the Cultural Framework Programme, with economic concerns for the cultural sector remaining at the forefront of any intervention.²³³ Since 2000, DG Culture has grouped its activities in the cultural sphere under its 'Cultural Framework Programme'. As analysed by Littoz-Monnet, since 2006²³⁴, there has been a paradigmatic shift towards the cultural sector providing a 'solution' to economic problems and away from the promotion of a European 'identity' and the protection, support and fostering of national culture.²³⁵ Littoz-Monnet refers to this as the 'creativity frame' which places emphasis on the wealth-generating capacity of the cultural 'industries' that, as outlined in the policy agenda, hold the potential to unlock un-tapped (or under-tapped) European assets. By framing the cultural sector in terms of its potential for competitive growth, the cultural agenda in the Union gained new momentum, particularly at a time when recession creeping in. Culture drives creativity, and creativity drives innovation: Innovation drives 'growth, competitiveness and jobs'.²³⁶ Given the strained economic conditions at the time, the emphasis of the Lisbon Agenda and the rise of the knowledge economy with its emphasis on intangible assets, this shift was accepted with ease – and perhaps also relief – at the both European and governmental levels. Through the competitiveness framework of the Lisbon Agenda and the clear need to focus on innovation and growth, culture found its way to a concrete base in the EU policy agenda.

However, interest in culture, creation and content did not remain in the sole interest of DG Culture. Other DGs, through the Lisbon Agenda, also took up the potential on offer to instrumentalise the sectors in different ways.²³⁷ Framed by DG Industry, creativity drove innovation; for DG Connect (then DG Information Society) the focal point was on technology convergence and the need to reduce blockages to the sharing of knowledge brought about by the sheer variety and rate of expansion of creation, provision and transmission of content and data; and for DG Markt cross-border accessibility became increasingly important given the increasing digitization of the

²³³ Littoz-Monnet, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012), 506.

²³⁴ Ibid, p. 510 et seq. She presents this as emanating from the 2006 Commission funded study 'The Economy of Culture in Europe', available here: <http://ec.europa.eu/culture/library/studies/cultural-economy_en.pdf> accessed 12.01.2015.

²³⁵ Ibid, p. 508.

²³⁶ Ibid, p. 510. She cites European Commission (2007), 'Communication from the Commission on a European Agenda for Culture in a Globalizing World', COM(2007) 242 final, Brussels, 10.05.2007, p. 9.

²³⁷ Littoz-Monnet, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012), p. 512.

sector. All of the arguments of these DGs remained focused on one goal: Enhancing the competitiveness of EU industry in face of economically difficult conditions and global pressures to innovate. With the recent move of copyright policy from the competences of DG Markt to DG Connect, the emphasis on competitiveness and accessibility that has already been favoured by the Commission during the ‘Licensing for Europe’ stakeholder dialogues²³⁸ seems to be assured. The worry of rightholders is that the shift will impact on the strength of their voice. This is particularly since DG Connect, especially under Neelie Kroes, has

“generally been seen to be pro-tech and telco-interests and less than supportive of copyright and the creative industries, while DG Market has been seen to be much more willing to defend the value of copyright in a digital age.”²³⁹

II. REDUCED VAT, COPYRIGHT AND FBP: NATIONAL HORSES IN EU LAW COURSES

This section looks at how the rules affecting publishing that are examined in our case studies - copyright, VAT and FBP - have all had to be re-framed with EU law in mind. The purpose is to show that despite the fact that the role of the EU in the cultural domain is far from clear cut, there is an interaction between the EU and national rules applying to the publishing sector. The Treaty can be seen to frame and restrict the extent to which MS are free to apply their own rules as they so please and secondary legislation demonstrates that to a certain extent at least MS have conceded elements that once fell wholly to national policy to the harmonisation project. Through both the case law of the CJEU leading to negative integration and these lengthy efforts towards harmonisation, the publishing sector has been affected by EU law despite its profoundly cultural construction.

What should be highlighted from the start however is that these interactions vary greatly between our case studies, thus covering the spectrum of balances between EU and national law. For copyright, the process has been one of harmonisation, through both the legislative and judicial routes, to the extent that there has been talk within the

²³⁸ See: <http://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>, accessed 15.01.2015. The author participated in these discussions in Brussels; for the purposes of this section full details are not necessary although it can be noted that many of the discussions therein, for example relating to user generated content and cross-border access were deemed largely irrelevant to the publishing sector participants.

²³⁹ J Enser, ‘New Commission, New Home for Copyright’, The Guardian, Online Edition 11.09.2014. Available at: <http://www.theguardian.com/media-network/olswang-partner-zone/2014/sep/11/new-eu-commission-new-home-for-copyright>, 06.10.2014.

Commission of a single unified EU Copyright Title to replace national systems.²⁴⁰ In the realm of VAT the VAT Directive has achieved harmonisation to a certain extent, but has not removed all definitional freedom from the MS; implementation of reduced rates is thus still within the national remit, although this must also be in keeping with fiscal neutrality. For FBP, we see that intervention has only really come from the Court and Commission, although support also at the political level and the introduction of Article 167 TFEU has likely swayed this to incline towards a retention, if not protection, of national systems. It is to these areas that we will now turn.

1. *Copyright exhaustion – conceding national ground towards harmonisation*

The field of copyright is vast and provides many examples of the national-EU policy see-saw. However, for the purposes of this section and in line with the focus of Chapter 5 of this thesis, the emphasis will be on one particular aspect: the principle of exhaustion. Unlike other areas within the copyright realm where the nationally-granted ‘existence’ of the right has remained intact²⁴¹, the progression through case law and now the Copyright Directive towards a fully harmonised ‘doctrine of exhaustion’ leaving no scope for MS differentiation shows that in this area at least national approaches have given way to the pursuit of internal market aims.²⁴² National law is therefore no longer really in the picture for our investigation in Chapter 5, however, this short section serves to show the concessions made to get us to this point and also highlights the level at which this submission took place: While the CJEU sought a balance, the adoption of the CD signalled an over-write approved by the legislature, so that even the ‘existence’ of nationally granted rights no longer has any bearing in the eyes of the Court. The point to take away from this discussion is that the national discretion between copyright systems is less pronounced and of less relevance to our investigation of copyright than is the case for VAT and FBP, where national choices retain a stronghold.

Although cases on copyright exhaustion specifically did not appear before the Court until 1970 with the *Deutsch Grammophon* case (which produced the ‘European exhaustion rule’ detailed in Chapter 5 of this thesis), the balance between nationally granted intellectual property rights more broadly and the principle of free movement within the EU was already being questioned by this point. The *Consten and Grundig* case concerned a grant of an exclusive right of distribution of the GINT trademark by the German firm Grundig to Consten, a French company.²⁴³ However, another French company – UNEF

²⁴⁰ European Commission (2013), ‘Public Consultation on the Review of the EU Copyright Rules’, Brussels, 05.12.2013 to 05.03.2014. <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf>, accessed 30.12.2013.

²⁴¹ For example, relating to collecting societies or exceptions and limitations

²⁴² Case C-479/04 *Laserdisken Aps v Kulturministeriet* [2006] ECR I-8089, [24] and [56].

²⁴³ Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

– also obtained and began to sell GINT marked products in France, resulting in an action by Consten against UNEF. The case that resulted was in fact based in competition law rather than one for trademark infringement: UNEF complained to the European Commission that the exclusive distribution agreement infringed (now) Article 101 TFEU²⁴⁴, and was contrary to the Treaty because it restricted parallel imports of the trademarked goods. The Commission agreed and imposed an injunction requiring that Consten and Grundig stop relying the national law that allowed for these imports to be restricted because the goods had never been placed on the market within the German territory. This decision was appealed.

Amongst the arguments of Consten and Grundig was a point based on (now) Article 345 TFEU questioning the interaction between EU and national law.²⁴⁵ This article provides that the Treaty ‘shall in no way prejudice the rules in Member States governing the system of property ownership’. Consten and Grundig argued that this could only mean that national copyright as a form of property ownership had to be left intact and could not be affected by the application of the Treaty. The Court disagreed, finding rather that injunction imposed by the Commission was necessary to remove the obstacle to parallel trade which had resulted from the national law, and that this caused no conflict with Article 345 because it did ‘not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article [101 TFEU]’.²⁴⁶

As such, the Court initiated began its active role in framing how nationally granted IP rights were to be interpreted in light of EU law. *Consten and Grundig* underlined the difference between the existence (grant) of rights, which remained to be decided at the national level, and the exercise of those rights which could – insofar as necessary to ensure the proper functioning of the competition provisions – be restricted by the provisions of the Treaty.²⁴⁷ That this distinction also applied to copyrights and not just to trademarks was confirmed by the *Deutsche Grammophon* judgment²⁴⁸ Deutsche Grammophon sought, through German copyright law, to restrict sales in Germany of products sold by its subsidiary in France and then re-imported into Germany. The subsidiary was licenced only to sell the records in France, however, Metro, a chain store

²⁴⁴ Then Article 85(1) EEC.

²⁴⁵ Then Article 222 EEC.

²⁴⁶ Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*, 345.

²⁴⁷ C Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford: Hart 2007), pp. 28-30.

²⁴⁸ Case 78/70 *Deutsche Grammophon Gesellschaft MbH v Metro-Sb-Großmärkte GmbH & Co. KG* [1971] ECR 487.

in Germany that had been refused direct supply of Deutsche Grammophone's records²⁴⁹ purchased the goods from the subsidiary, and then proceeded to sell them in Germany at less than the manufacturer's fixed price. The German copyright law provided for exhaustion of Deutsch Grammophone's copyright only where the record had been marketed with its permission within the German territory.²⁵⁰ This was not the case for the records sold by Metro, which had only been authorised for sale in France.

The case was appealed through the German court system, resulting in a reference for a preliminary ruling to the CJEU based on what is now Article 101 TFEU.²⁵¹ However, the CJEU did not restrict its response to this framing²⁵²; it rather looked to the free movement provisions and reiterated what it had said before in *Consten and Grundig*, but this time elaborating its existence/exercise dichotomy to refer to the 'specific subject matter of rights':

"[A]lthough the Treaty does not affect the existence of rights recognised by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article [36 TFEU] only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property."²⁵³

In this case, the Court found that rights granted by national law were being *exercised* in such a way so as to

"[P]revent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets,

²⁴⁹ This was because Metro had previously sold at below the manufacturer's fixed price despite being contractually bound to refrain from such action.

²⁵⁰ Article 85 of the Urheberrechtsgesetz (German Copyright Law).

²⁵¹ Then 85 EEC.

²⁵² WIPO (2011), 'Interface between Exhaustion of Intellectual Property Rights and Competition Law', CDIP/4/4 REV./STUDY/INF/2, Geneva, 01.06.2011, [49], [50].

²⁵³ Case 78/70 Deutsche Grammophon, [11].

would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.²⁵⁴

The existence/exercise dichotomy has found many critics, not least because of its inexact nature. Partly, this is because the substance of rights differs between MS, with some recognising moral rights as an inherent part of their copyright, and partly because the ‘specific subject matter’ depends on the right at issue meaning that it is difficult to generalise.²⁵⁵ Indeed, in *Deutsche Grammophon* itself, although the Court indicated that the ‘specific subject matter of the right’ was key, it made no attempt to define what the specific subject matter was.²⁵⁶

In later cases the Court has attempted such a definition for example, in *Phil Collins* it found that for copyrights

“The specific purpose of these rights, as governed by national law, is to protect the moral and economic rights of their owners. The protection of moral rights enables authors and artists to resist any distortion, mutilation or other alteration of the work which would be prejudicial to their honour or reputation. Copyright and related rights also have economic characteristics in that they provide for the possibility of commercially exploiting the marketing of the protected work, particularly in the form of licences granted in return for the payment of royalties.”²⁵⁷

Asides from the language of the ‘specific subject matter of the right’, *Deutsche Grammophon* also set out the principle of European exhaustion. This principle means that upon the first sale by or with the permission of the manufacturer of an IP protected product within the Union, any right to block the further circulation of that copy within the internal market dissipates.²⁵⁸ This has since been codified by secondary European law, most notably the Copyright (or Information Society) Directive.²⁵⁹ However, as detailed

²⁵⁴ Ibid, [12].

²⁵⁵ C Seville, *EU Intellectual Property Law and Practice* (Cheltenham, UK: Edward Elgar 2009), pp. 323-325. An example of a mistake in this regard is the CFI in *Magill*, where the Court makes reference to a reward; clearly this would not be at issue if it were the reproduction right at issue rather than that of communication or distribution. Defining the specific subject matter in terms of rewards for creation would alter the rights, turning them into remuneration rights only. See Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission (Magill) [1995] ECR I- 743

²⁵⁶ In *Deutsche Grammophon* this was because the Court was already convinced that the national law imposed restrictions on the free movement of goods within the EU. On the utility of the dichotomy. DT Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (Oxford: Oxford University Press 2004), p. 56.

²⁵⁷ Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, [20].

²⁵⁸ Case 78/70 *Deutsche Grammophon*, [11].

²⁵⁹ Ibid.

in Chapter 5, the application of the principle to electronic services (which e-books are) is as yet uncertain.

The emergence of the doctrine of European exhaustion brought the removal of national variations in approaches to the rights retained after first sale in the EU, but through the existence/exercise dichotomy the MS retained control of which rights could be granted in the first place: Keeling notes that

“Perhaps the one useful element [...] is that it serves as a reminder that, whatever limitations Community law imposes on the exercise of an intellectual property right, it must not destroy the substance of the right. The nucleus of the exclusive right recognised by national law must remain intact.”

However, even this balance between EU and national law, which appears to be an inherent part of the dichotomy, is superficial. The Court has sometimes has paid curious attention to the merits of the granting of rights under national law in the first place, which indicates that leaving the existence intact does not hold true for all cases.²⁶⁰ The dichotomy has also been subject to significant criticism and treated with suspicion in literature for other reasons.²⁶¹ Stothers makes the point that intellectual property rights come as a separable bundle, within which for example the communication, distribution, reproduction, performance or lending rights are contained. Stothers finds the language of the CJEU as regards EU law’s influence on the exercise of IP rights inaccurate in this respect: EU law can never alter the exercise of these sub-rights where EU law has no place, for example where the trade is taking place external to the Union. He argues therefore that the bundle of IP rights ‘still exists even if specific sub-rights may not be exercised and, therefore, to all intents and purposes do not exist.’²⁶²

Where no harmonisation has taken place, the CJEU has on a regular basis reiterated that it is for national law to determine how IP rights are granted (i.e. the conditions for their existence). However, over time the process of harmonisation has meant that the conditions for grants of rights, their substance and scope has become more uniform throughout the MS. In Chapter 5 therefore the national framework is rendered almost irrelevant, because insofar as the question of digital exhaustion is concerned the answers are to be found at the EU level through the harmonising Directives. However, even in this respect we can tell from the *UsedSoft* ruling that the court nonetheless remains

²⁶⁰ Keeling, *Intellectual Property Rights in EU Law Volume I: Free Movement and Competition Law* (2004), p. 58.

²⁶¹ Ibid, Chapter 5; Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (2007), p. 58 et seq.

²⁶² Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (2007), p. 30.

concerned with the balance between authors rights (nationally granted) and the free movement provisions.

2. *VAT: Harmonisation or preservation?*

The situation of books under the EU VAT regime is set out in secondary legislation. Although the process towards VAT harmonisation began earlier, it was the sixth VAT Directive of 17th May 1977 that made the most resounding difference to the framework, when MS governments agreed to set the criteria for the VAT base to apply, meaning that the definition of what goods and services could be exempted became uniform.²⁶³ Article 28(2) of the Sixth Directive allowed a concession for reduced rates or exemptions for ‘clearly defined social reasons and for the benefit of the final consumer.’²⁶⁴ This allowance was largely due to the UK’s resistance against doing things the ‘Brussels way’ which would, as originally envisaged, have meant the upheaval of all its reduced or zero rate bands.²⁶⁵ This concession enabled MS with reduced rates in place for books to retain those rates so long as they continued to meet this criteria. That reduced rates for books are adopted for ‘social reasons’ and that they produce ‘benefit[s] for the final consumer’ has never been questioned before the CJEU.

Directive 92/77/EEC²⁶⁶ amending Directive 77/388/EEC introduced the dual rate system. This gives MS the option to apply one or two reduced rates, with brackets set by the Directive.²⁶⁷ However, the MS’ ability to designate which goods and services they wanted to benefit from the reduced rate is not open-ended. Derogations from the standard rate are only allowed for the limited list of goods and services that are set out in what is now point 6 of Annex III (originally Annex H of the sixth Directive). This list includes the ‘supply, including on loan by libraries, of books (including brochures, [...] or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising’²⁶⁸, therefore meaning that MS have the possibility to provide for

²⁶³ Directive 77/388/EEC of the Council of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment (‘Directive 77/388/EEC of the Council of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment’) OJ L145/01 of 13/06/1977.

²⁶⁴ Article 17, *ibid*.

²⁶⁵ DJ Puchala, *Fiscal Harmonization in the European Communities : National Politics and International Cooperation* (Bloomsbury Academic 2013), Chapter 6 ‘Britain Confronts the Community’.

²⁶⁶ Council Directive 92/77/EEC of 19 October 1992 Supplementing the Common System of Value Added Tax and Amending Directive 77/388/EEC (Approximation of VAT Rates) (‘Directive 92/77/EEC’) OJ L 316/1.

²⁶⁷ Article 98 TFEU.

²⁶⁸ Directive 2002/38/EC of the Council of 7 May 2002 Amending and Amending Temporarily Directive 77/388/EEC as Regards the Value Added Tax Arrangements Applicable to Radio and Television Broadcasting Services and Certain Electronically Supplied Services (‘ESS Directive (2002)’) OJ L128/41 of 15/05/2002.

reduced rates for books should they so choose. Further, the level of the reduced rate itself is also constrained in so far as it cannot be below 5%.

Despite this restriction, the 1992 Directive also enabled MS to maintain existing reduced rates or exemptions lower than 5% if they were already in place on the 1st of January 1991 and so long as they met the criteria set out by the sixth Directive (i.e. they ‘have been adopted for clearly defined social reasons and for the benefit of the final consumer’).²⁶⁹ This possibility is retained in the current version of the VAT Directive, and is the reason why to this day Luxembourg can apply a super-reduced rate to books (3%), while the UK and Ireland apply zero rates.²⁷⁰ In the case against Luxembourg before the CJEU, there was as such an issue as to whether e-books are included in the ‘existing’ rate (a question which was not pertinent to the French case).²⁷¹

Although in the interests of harmonisation the Commission would have preferred to remove the varied reduced rates altogether from the equation, it acknowledged that:

“[S]ince all the Member States with the exception of Denmark and the United Kingdom apply at least two VAT rates, a reduced rate and a standard rate, it would seem desirable not to upset the tax structures of the majority of Member States.”²⁷²

The reason for the inclusion of books on the list in Annex III is that at the time of the Commission’s 1987 proposed amendment to the sixth Directive the majority of MS gave books a special treatment in this regard.²⁷³ It found that ‘there is a considerable degree of consistency in the different Member States’ insofar as ‘the coverage of the reduced rate or rates is generally restricted to items of basic necessity’.²⁷⁴ The Commission’s proposal

²⁶⁹ Consolidated Text of 15th August 2013 of Directive 2006/112/EC of the Council of 28 November 2006 on the Common System of Value Added Tax (‘Consolidated VAT Directive (v.2013)’) OJ L347/1 of 11.12.2006, Article 110. “Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates. The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer.”

²⁷⁰ European Commission (2014), ‘VAT Rates Applied in the Member States of the European Union - Situation at 13th January 2014’, Taxud.c.1(2014)48867, Brussels.
<http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf>, accessed 17.02.2014.

²⁷¹ Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*.

²⁷² European Commission (1987), ‘Proposal for a Council Directive Supplementing the Common System of Value Added Tax and Amending Directive 77/388/EEC—Approximation of VAT Rates,’ COM (1987) 321 Final/2, Brussels, 1.

²⁷³ Ibid.

²⁷⁴ European Commission (1987), ‘Completion of the Internal Market: Approximation of Indirect Tax Rates and Harmonization of Indirect Tax Structure. Global Communication from the Commission’, COM(87) 320 final/2, Brussels, 26.08.1987, 10.

was in this respect met ‘with approval’ by the EESC²⁷⁵ and the inclusion of books on the list of goods that could benefit from the reduced rate went without question.

Generally, the VAT Directive does not cause any real problems for MS national book policies because their pre-existing systems have mostly fitted within those permitted by the Directive. In this sense, rather than harmonisation goals taking precedence in the run up to the inclusion of Annex III it seems clear that preservation of existing systems was taken as a priority. However, since 1992 the situation has been somewhat different for new MS; upon accession they lost their ability to apply rates below 5% unless agreement was reached during the accession process on this matter. Poland is the only ‘new’ MS to have negotiated specifically regarding VAT on books with the effect that during a transitional period until the 31st of December 2007 it was allowed to maintain zero rates on books, but this benefit was not subsequently extended.²⁷⁶ As such, the willingness to preserve national approaches is indeed more limited than might at first have seemed.

The definition of a ‘book’ is not set out by the Directive, with the result that MS can choose to be more or less inclusive depending on their policy aims, for example by including schoolbooks or picture books. Examples of such definitions have already been outlined in Chapter 2 and it should also be highlighted that the choice of definition would be relevant for the application of the principle of fiscal neutrality as noted in Chapter 3. As such, the application of EU law by the Commission firstly and subsequently by the Court may have effects on the freedom of MS in their choice if neutrality necessitates a different definitional scope than is set out by the national legislation.²⁷⁷ While the VAT framework clearly enables – even encourages – national differentiations, the dual rate system also leaves the door open for the apparent definitional freedom to be applied in a non-neutral way.

It is here with the application of the principle of fiscal neutrality that EU law steps in to curtail the apparent freedom offered by the VAT framework. As such, ex post EU law can have significant effects on the choice of the MS. This intervention is not, however, based on harmonisation: Even where neutrality necessitates a change in the breadth of

²⁷⁵ Economic and Social Committee (1988), ‘Opinion: The EESC Supports the Removal of Fiscal Frontiers’, Opinion 739/88, Brussels, July 1988, 22, 23. At p 23 it was also noted that: “However, several Member States currently apply a zero rate, on the principle that it is wrong to tax knowledge, information, education and literacy. As in the case of foodstuffs (see above), this right should be retained.”

²⁷⁶ European Commission (2003), ‘Report on the Results of the Negotiations on the Accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union’, Brussels, January 2003, 29.
<http://ec.europa.eu/enlargement/pdf/negotiations_report_to_ep.pdf>.

²⁷⁷ Discussed in the legal characterization Section IV of Chapter 2.

the category to which reduced rates are applicable within a MS, this does little to align that category with the policy of another MS. In this sense, quite the opposite from EU law undermining national policy, the VAT Directive provides a concession from the harmonisation project even if this may not be the European ideal. The interaction between EU law and national cultural policy in the field of VAT is in this respect very different from our other case studies, as will become clearer when we turn to look at each in turn in Chapters 5, 6 and 7.

3. *Fixed Book Pricing – case law clips national policy choices*

Fixed book pricing (FBP), or resale price maintenance (RPM), affects the structure of competition. It is a vertical restraint of trade, set in place with the aim of curbing the retailer's ability to discount the price of books. Publishers are required to set a minimum price, so that retailers may then sell the book for that price or more. It should also be noted that publishers do not set a standard price for all titles across the board, but must instead fix one for each title individually. There is still, therefore, variation between the price of each title (inter-brand competition), but no price competition between retailers for the same title (intra-brand competition). All FBP systems are limited to some extent, in duration, in scope and in the extent to which they do allow discounts.²⁷⁸

From the perspective of the European Union, by far the most important aspect of the functioning of these laws is how they relate to cross-border transactions, imports and exports.²⁷⁹ In the EU, Austria, France, Germany, Greece, Italy, the Netherlands, Portugal, Slovenia and Spain all have national 'fixed book pricing' laws in place, stipulating that publishers must set minimum prices for the books that they publish and that these prices must be applied by retailers.²⁸⁰ The subject is, however, polarised. Some countries such as Ireland, the UK, Sweden and Finland stick by their decision to abolish their previous fixed price systems or remove the trade agreements enabling them. A further group can be considered as would-be supporters: Belgium, Denmark and Poland would fall into this category.²⁸¹

²⁷⁸ In France and Austria, the laws cease to control the retail price for editions over 2 years old where the book was last supplied over 6 months previously. In Germany, this period is 18 months, and there is an additional requirement that the publishers must announce that they are lifting the fixed price. Austria Section 5.3, France Article 5., Germany Section 8.1. As an example of permitted discounting, the *loi Lang* provides that the retailers can apply a discount of up to 5%. This provision is not replicated in Austria and Germany, although discounts are permitted for use in libraries and schools.

²⁷⁹ In this section, it is useful to bear in mind that 'imports' refers to sales of books on the national territory, while 'cross-border' sales may refer to sales both on or off the national territory.

²⁸⁰ See International Publishers Association, 'Global Fixed Book Price Report', 23.05.2014. <<http://www.internationalpublishers.org/images/stories/news/FBP.pdf>>, accessed 02.06.2014; Frankfurt Buchmesse (2014), 'Book Markets', <http://www.buchmesse.de/fbmsite/en/international/book_markets/index.html>, accessed 10.10.2014.

²⁸¹ The Memorandum of the Belgian BoekenOverleg (2014) bundles the demands of the book sector upon the legislator and has requested a book price regulation be imposed at the national level: See Belgian Publishers Association (Adeb) and Flemish Publishers' Association (Vuv), 'Report Compiled by the for the

What can be said about FBP in comparison to our other two case studies is that the process of negative integration by way of contemplation by the EU Courts rather than positive harmonisation by the EU legislature is much more strongly felt in this area. Here, as has been elucidated by Schmid, we come across a horizontal conflict of norms: The EU free movement rules and national cultural policies have different subject matters at their core, meaning therefore that there can be no clear resolution as would be the case in a situation of hierarchical conflict.²⁸² Nor is there any harmonisation project in this area, meaning there is also no EU legislative instrument designating the allocation and boundaries of decision-making competences and boundaries, as is the case for the VAT and the Copyright Directives.²⁸³ Instead, the ‘rules’ examined below and in the following case study on FBP are the result of a delicate balance between competing, but equal norms: Negative integration, undertaken principally at the judicial level but also by the European Commission in its enforcement capacity, has been key to reaching the equilibrium between free movement and the varying national cultural approaches.

The first case to come before the CJEU on this matter was VBVB²⁸⁴, a clear-cut case of a FBP agreement between the Flemish and Dutch trade associations with transnational effect. The CJEU²⁸⁵ had no difficulty in finding that the transnational nature of this agreement affected trade between MS since ‘regard being had to the linguistic community between the Netherlands and the Flemish part of Belgium, the geographical region to be taken into account is not the political territory of the two States in question but the Dutch-language territory inasmuch as it forms a single entity.’²⁸⁶ Very clearly, Article 101 refers to trade *between* MS. Thus, in 1984, the CJEU brought the transnational agreements definitively to an end, drawing the conclusion that:

Federation of European Publishers AGM in Vilnius, June 2014’. <<http://www.fep-fee.eu/IMG/pdf/belgium.pdf>>, accessed 12.08.2014; Boekenoverleg, ‘Memorandum’. <<http://staatvanhetboek.be/documenten2014/memorandum.pdf>>, accessed 10.09.2014.

²⁸² C Schmid, ‘Diagonal Competence Conflicts between European Competition Law and National Law - the Example of Book Price Fixing’ (2000) 8 (1) European Review of Private Law.

²⁸³ This said, the European Parliament and Council have in the past made several calls for a clarification of the situation of FBP systems under EU law: See Council of the European Union (1997), ‘Decision of 22nd September 1997 on Cross-Border Fixed Book Prices in European Linguistic Areas’, OJ C 305/02, Brussels; Council of the European Union (1999), ‘Resolution of 8th February 1999 on Fixed Book Prices in Homogeneous Cross-Border Linguistic Areas’, OJ C 42/02, Brussels; EP - Resolution on the Fixing of Book Prices (1981); EP - Resolution on the Fixing of Book Prices (1987); EP - Resolution on the Communication from the Commission on the European Dimension with Regard to Books (1987); European Parliament, ‘Resolution of 21 January 1993 on the Promotion of Books and Reading in Europe’ (1993); European Parliament (1998), ‘Resolution of 20 November 1998 on the Book Pricing System Adopted by Germany and Austria’, OJ C 379/391.

²⁸⁴ Joined Cases C-43, 63/82 *Vereniging Ter Bevordering Van Het Vlaamse Boekwezen (VBVB) and Vereniging Ter Bevordering Van de Belangen des Boekhandels (VBBB) v Commission* [1984] ECR 19.

²⁸⁵ Note that the Court of First Instance (now the General Court) did not come into being until the 1st of January 1989, so the appeal from the Commission decision was directed straight to the CJEU.

²⁸⁶ Joined Cases C-43, 63/82 *Vereniging Ter Bevordering Van Het Vlaamse Boekwezen (VBVB) and Vereniging Ter Bevordering Van de Belangen des Boekhandels (VBBB) v Commission* [47].

“[E]ven on the supposition that the specific nature of books as an object of trade may justify certain special conditions in the matter of distribution and price... the very fact that two large national associations... have extended to intra-Community trade the closely supervised rules which are in force within them constitutes a sufficiently marked restriction of competition to justify the [application of] Article [101(1)].”²⁸⁷

While this ruling recognised that ‘books are different’ from other trade items, they were not different enough to warrant an exclusion from the competition rules. Subsequent to *VBVB*, several other FBP agreements came under EU law scrutiny: the *Net Books Agreement* in the UK and Ireland²⁸⁸; the Dutch *Handelsreglement*; the German-Austrian-Swiss *Drei-Länder-Revers*²⁸⁹; and the German *Sammelrevers*.²⁹⁰ These cases will be described below in closer detail as, when read in conjunction with the case law under the free movement provisions, we can deduce that in internal market terms there has been a progression towards a subtle acceptance of FBP and a more lenient application of the Treaty provisions than for other commercial goods. This progression can be linked to the introduction, in 1992, of the cultural clause of Article 167 into the Treaty.²⁹¹

The more interesting string of case law emanates from Member State action. Although trade agreements enabling fixed pricing may have been accepted or even encouraged at the national level, they cannot be said to represent a specific policy level decision approving the special treatment of books.²⁹² Where instead MS laws mandate fixed prices, we fall out of the realm of competition and into that of free movement.²⁹³

²⁸⁷ European Commission (2004), ‘Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty’, Directorate General For Competition, Brussels, European Commission, point 22.

²⁸⁸ *Comp/27.393 and Comp/27.394 Publishers Association Re Net Book Agreements* [1988] OJ 1989 L 22, p. 12-35.

²⁸⁹ G Bittlingmayer, ‘Resale Price Maintenance in the Book Trade with an Application to Germany’ (1988) 144 (5 December) *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*. ; U Everling, *Book Price Fixing in the German Language Area and European Community Law (Buchpreisbindung Im Deutschen Sprachraum Und Europäisches Gemeinschaftsrecht)* (Baden: Nomos 1997).

²⁹⁰ *Comp/34.657 - Sammelrevers and Comp/35.245 to 35.251 Einzelreverse* [2000] OJ C 162 10/06/2000 P.0025-0026.

²⁹¹ Kitz, ‘The Difference between Books and Chocolate Bars - How EC Treaty Art. 151(4) Affects Community Actions’ (2004).

²⁹² See the UK NBA Restrictive Practices Court Submissions as referred to in *Comp/27.393 and Comp/27.394 Publishers Association Re Net Book Agreements*; RE Barker and GR Davies, *Books Are Different: An Account of the Defence of the Net Book Agreement before the Restrictive Practices Court in 1962* (Macmillan 1966).

²⁹³ Although perhaps not so clearly as one might expect. The often cited Leclerc case of highlights the difficulty – See P Pescatore, ‘Public and Private Aspects of European Community Competition Law’ (1986) 10 *Fordham Int'l LJ.* ; G Marengo, ‘Competition between National Economies and Competition between Businesses-a Response to Judge Pescatore’ (1986) 10 *Fordham Int'l LJ.* ; P Pescatore, ‘European Community Competition Law- a Rejoinder by Judge Pescatore’ (1986) 10 *Fordham Int'l LJ.*

The most well known case concerning MS FBP law is *Leclerc v Au Ble Vert*, dating from 1985. Until that point the French loi Lang had ensured that imported books were sold at a price fixed by the ‘principal importer’ (with the effect of removing price competition between importers) and that imports of French published books –‘re-imports’– were still subject to the publisher-set price. The CJEU was sure to spot a measure of equivalent effect to a quantitative restriction (MEEQR) in contravention of Article 34 TFEU²⁹⁴, but already in the *Leclerc* ruling the Court gave an indication that the book sector is to be treated in manner that is not altogether coherent with other sectors trading in commodities.

There are three rather well documented ‘oddities’ of this judgment that support such an indication: Firstly, the Court altered the formulation of the question referred to respond primarily on the basis of the free movement, rather than the competition provisions under which the questions were framed. In doing so – much to the annoyance of Judge Pierre Pescatore, although explicable in the eyes of others²⁹⁵ – the Court sidestepped the underlying issue with fixed pricing that regardless of the fact that it is a result of national law, that price competition is completely removed²⁹⁶. Secondly, it applied the ‘circumvention rule’, also known as the ‘abus de droit’ principle²⁹⁷, which looks at the purpose of the Treaty as a whole, one has difficulty reconciling with the free movement objectives of EU law and the wording of Article 34 itself (which provides no hints as to a difference between imports and imported exports (‘re-imports’)). The ‘circumvention rule’ applied in *Leclerc* means that where books are exported ‘for the sole purpose of re-importation in order to circumvent the national legislation at issue’ there is no infringement of the Treaty rules.²⁹⁸ The Court’s application of this rule can be explained in two ways; on the one hand, the Court may have sought to safeguard the national law by incorporating a large measure of deference to the national legislator, giving scope to

²⁹⁴ Then Article 30 EEC.

²⁹⁵ Despite the questions raised in this section, Galmot and Biancarelli provide an explanation for the focus of the judgment on the free movement provisions even if these were not referred to in the questions referred. Citing previous case law on minimum resale price maintenance, they conclude that this move is, in fact, rather conventional. They refer in this respect to the adoption of the Directive 70/50/EEC of 22 December 1969 ‘on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty’. This places such measures within the scope of the free movement provisions, and so it is only logical that the Court should adopt this approach. On this basis, the move by the Court from Article 3(f), 5 and 85 EEC to Article 30 may not seem so out of place. See Y Galmot and J Biancarelli, ‘Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire’ (1985) 21 (269) *Revue Trimestrielle de Droit Européen*.

²⁹⁶ At least insofar as only ≤5% discounts are allowed, etc.

²⁹⁷ *Leclerc* was not the first case in which the CJEU applied this principle; see Case 33/74 *Van Binsbergen v. Bestuur Van de Bedrijfsvereniging Voor de Metaalnijverheid* [1974] ECR 1299.

²⁹⁸ Case 229/83 *Leclerc*, [27].

apply the circumvention rule in national law with whatever interpretation of the ‘sole intention’ criterion they so please.²⁹⁹

This strand of reasoning would support the thesis that there exists a rather unusual relationship between European law and national fixed book pricing policies, since the Treaty is there to achieve economic integration goals and not to protect Member State’s (diverging) laws. Alternatively, the rule could be seen as a sort of *de minimis* style attempt to remove from its caseload what are technically internal situations with no intra-community effects, but which have artificially been taken outside the national realm to evade the national law, from the scope of EU law. This explanation would rather indicate that the Court is willing to concern itself only with ‘pure’ internal market concerns.³⁰⁰

Thirdly, and most significantly, the Court in *Leclerc* refused to analyse the indistinctly applicable measure on reimported books as from the perspective of mandatory requirements, as would be expected from the already-established *Cassis* and *Dassonville* formulations.³⁰¹ Looking at the provisions instead as distinctly applicable to internal sales and imported books brought the result that public interest justifications for the restriction on intra-community trade could not be taken into account. This exhibits an unexpectedly harsh treatment of the French legislation on reimported books by denying it the benefit of analysis as an indistinctly applicable measure. In fact, if the Court had just categorised the provision as such and then denied any public policy justifications were possible, this could well have led the history of fixed book pricing in an altogether different direction.

These three ‘oddities’ serve to show that there is an inherent contradiction in the *Leclerc* judgment. This manner of to-ing and fro-ing suggests some level of acceptance on the part of the Court of the national policy already in 1985. Between the 1985 *Au Blé Vert* judgment, and July 1988, there were six further preliminary rulings by the CJEU on the subject of the *loi Lang*³⁰² and a further reference, *Echirolles* was made much later.³⁰³

²⁹⁹ See for example, Amsterdam District Court *Royal Dutch Book Trade Association et al. v Edumedia Bv/Boekenconcurrent* [2009] decision of 03/12/2009, LJN: BK6182.

³⁰⁰ N Charbit, ‘RPM in the European Publishing Sector’ (1993) *International Business Law Journal*. ; Galmot and Biancarelli, ‘Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire’ (1985).

³⁰¹ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville*. [1974] ECR 837; Case 120/78 *Rewe-Zentral Ag v Bundesmonopolverwaltung für Branntwein (Cassis)* [1979] ECR 649. The *Cassis* ruling was delivered in 1979; the *Leclerc* ruling was not settled until 1985. The Court first put the *Dassonville* formula together with that of *Cassis* in June 1980, in Case 788/79, *Gilli & Andres* [1980] ECR 02071. As such, it was by the time of *Leclerc* settled case law that mandatory requirements could justify indistinctly applicable measures only.

³⁰² Advocate General Slynn gave his opinion in five of these references, but by February 1987 his obvious frustration was showing: “It is noted that the Court’s judgment *Cognét* was supplied to the referring court

Surprisingly, these cases were heard by the Court although they did not raise particularly new issues; in each, the Court swiftly reiterated the approach to imports and re-imports it set out in *Leclerc* and repeatedly referred back to this case.

Further elaborating upon the place of fixed pricing in the European framework, between 1997 and 2002, the European Commission engaged in investigations of the Dutch, German and UK trade agreements which were in place at that time. Although these were decisions in the realm of competition law, the agreements in question were supported by national governments. The Commission's criticism of the UK Net Book Agreements as restrictive of competition was appealed to the CFI and then to the CJEU. The CJEU, in contrast to the CFI and Commission findings, showed some sympathy for the cultural (linguistic) concerns behind the system and opened the door for the Commission to re-consider its approach to fixed pricing in shared-language areas: Whereas in VBVB the Court had rejected the submission that a single language area could form a single market, in NBA the Court criticised the Commission decision for failing to take this into account and for dismissing the findings of the 1962 UK Restrictive Practices Court decision in support of the NBA³⁰⁴:

“It follows that, in view of the existence of a single language area formed by the British and Irish markets, the Commission did not give adequate reasons for its decision on this point.”³⁰⁵

The real point to be taken from this decision is the amount of deference the CJEU shows to the national Court decision. Had the industry in both the UK and Ireland been willing to support their agreements before the UK Courts, arguing that they were necessary for the functioning of the industry, it seems all the more likely that based on the CJEU decision, the Commission would have *had* to take that opinion into account.³⁰⁶

which, however, maintained its request for a preliminary ruling. Since... under Community law and procedure in such a situation it is open to the national court to withdraw a reference, it is to be hoped, in those Member States where it cannot apparently done at present, that a way may be found for national law and procedure to make such a withdrawal possible when no new issue arises, when no new arguments are advanced and where the Court's answer can only be the same.” See Case 299/83 *Leclerc v Syndicat des Libraires de Loire-Océan* [1985] ECR 2517; Case 95/84 *Boriello and the Syndicat des Libraires du Sud-Est v. Alain Darras and Dominique Tostain* [1986] ECR 2253; Case 355/85 *Mr Driancourt, Commissioner of Police, Thouars, Carrying out the Duties of Public Prosecutor v Michel Cognet* [1986] ECR 03231; Case 168/86 *Procureur Général v Yvette Rousseau* [1987] ECR 00995; Case 160/86 *Ministère Public v Jacques Verbrugge* [1987] ECR 01783; Case 254/87 *Syndicat des Libraires de Normandie v. L'aigle Distribution — Centre Leclerc* [1988] ECR 04457.

³⁰³ Opinion of A-G Slynn of 4th February 1987 Case 168/86 [1987] ECR 00995.

³⁰⁴ MA Utton, ‘Books Are Not Different after All: Observations on the Formal Ending of the Net Book Agreement in the UK’ (2000) 7 (1) *International Journal of the Economics of Business*, p. 116.

³⁰⁵ Case C-360/92 *The Publishers Association v Commission* [1995] ECR I-0023, [44].

³⁰⁶ Utton, ‘Books Are Not Different after All: Observations on the Formal Ending of the Net Book Agreement in the UK’ (2000).

Unfortunately for our purposes, the CJEU ruling had little practical difference. In the greater industry context, the NBAs had been spurned and publishers no longer applied a fixed price to their titles. The voluntariness upon which the system relied was thus lost by the time of the final appeal to the CJEU and the industry was no longer willing to argue before the UK Courts that the agreements should remain valid. As such, in 1997, the UK Court found that the NBA was no longer in the public interest. The NBAs were all but extinct by the time of the ECJ judgment and as such there was no need for the Commission to look into the matter further.

Following this, the Commission was visibly more careful in its approach to fixed book pricing. At around the same time as the NBAs were becoming unbound, the Commission undertook investigations into the Dutch³⁰⁷ and German³⁰⁸ language agreements.

In the Dutch example, the VBVB case had resulted in the transnational Dutch-Belgian agreement being replaced by a national trade agreement³⁰⁹. This was found not to affect inter-state trade in 1999, a decision of the European Commission which, like that concerning the German *Sammelrevers* made at around the same time, sits uneasily with EU competition law where *any* effect on trade should be enough to catch the agreement.³¹⁰ The German investigation was more elaborated than the Dutch, and serves as a good example of the apparent leniency offered by the Commission regards book pricing schemes endorsed by MS, even where they do not take the form of national laws. In both countries, the FBP agreements being used at the time of the investigations were later transferred into laws (in the German case this occurred in 2002, and for the Netherlands this was in 2005).

³⁰⁷ On the 24 April 1998, the Commission found the Dutch fixed book price system infringed EU competition rules and could not qualify for exemption. By 1st May 1998 the agreement was amended to the Commissions satisfaction, at which point it declared there to no longer be an effect on trade. From 2005, a law has since replaced this private system in the Netherlands. European Commission (1999), 'Commission Closes File on Dutch Fixed Book Pricing System', Decision IP/99/668, Brussels. <http://europa.eu/rapid/press-release_IP-99-668_en.htm>.

³⁰⁸ *Comp/34.657 - Sammelrevers and Comp/35.245 to 35.251 Einzelreverse*.

³⁰⁹ In Belgium a trade agreement also placed the transnational agreement, until Belgium removed fixed pricing altogether after failed attempts in 2002 to transpose it into law.

³¹⁰ It is only where the agreements 'affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question,' they are not within the scope of Article 101(1) Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare Di Novara Soc. Coop, Arl (Bpn) and Cassa Di Risparmio Di Genova E Imperia Spa (Carige)* [1999] ECR I-161, , where no effect on inter-state trade is found. Bagnasco was later applied by the Commission in its Dutch Acceptance Giro System decision: *ibid*, [52]. See European Commission (1999), 'Nederlandse Vereniging Van Banken (1991 Gsa Agreement), Nederlandse Postorderbond, Verenigde Nederlandse Uitgeversbedrijven and Nederlandse Organisatie Van Tijdschriften Uitgevers/Nederlandse Christelijke Radio Vereniging', 1999/687/EC, Dutch Acceptance Giro System, OJ L 271, 21/10/1999 P. 0028 - 0040.

Initially, the German FBP consisted of a system of collective reverses, *Sammelrevers*. *Buchenpreisbindung* is an ‘anomaly’³¹¹ as the only form of vertical restraint allowed to prevail under the national Law against Restraints of Competition.³¹² The German system was connected to both its Austrian and Swiss counterparts to form the *Drei-Länder-Revers*, which, until the accession of Austria to the European Union in 1995, caused no particular European concerns. In January 1998, the Commission opened a formal investigation with the result that the *Drei-Länder-Revers* was found not to be compatible with EU law. The new German (national) *Sammelrevers* which replaced this was found in 2000 to restrict competition – by not allowing booksellers to compete – but it was also found that there was no effect on trade between MS. European competition law was not applied to this agreement because of its purely national scope. However, in 2001, the Commission sent a statement of objections to the effect that the *application* of the agreement (i.e. not the agreement itself) was incompatible with the Treaty.³¹³ This was based on evidence that German publishers were refusing to supply Internet retailers outside of Germany, in order to prevent direct cross border sales (to German consumers) at a lower price than that fixed in Germany. As such, the implementation of the *Sammelrevers* in the market context of Internet sales *did* have an effect on trade. The assurance that direct cross-border sales (from other MS) to final consumers in Germany would be priced freely was an important part of the negative clearance decision of the Commission in 2000. The Commission did finally accept undertakings to resolve the cross-border effects resulting from alleged collusion, however it should be reiterated that the Commission was not at this later stage interested in assessing the vertical agreements themselves under the competition provisions but rather in eliminating their possible horizontally collusive effects.

What can be drawn from the German and Dutch examples is that opinion of the Commission with respect to FBP appears to be that the competition provisions do not apply where the FBP agreement exists within a single Member State. This is unusual in the greater context of the ‘effect on trade doctrine’ developed through the case law, and now provided for in the Commission’s own Guidelines.³¹⁴ The case law from other sectors serves to demonstrate that, in European competition law, a finding of ‘no

³¹¹ V. Sich (2004), ‘The System of Fixed Book Prices in Germany’, Tel Aviv University, in Frankfurt am Main. <<http://www.tau.ac.il/~nirziv/FixedBookPricesinGermany1.pdf>>.

³¹² Gesetz gegen Wettbewerbsbeschränkungen, GWB. The system was not made up of horizontal agreements, but rather model contracts between publishers and booksellers, administered by a trust; see Everling, *Book Price Fixing in the German Language Area and European Community Law (Buchpreisbindung Im Deutschen Sprachraum Und Europäisches Gemeinschaftsrecht)* (1997), p. 77.

³¹³ This rings a bell with the existence/exercise dichotomy in the copyright context described above.

³¹⁴ *Comp/34.657 - Sammelrevers and Comp/35.245 to 35.251 Einzelreverse*.

appreciable effect on trade', as the Commission insisted was the case for the nationalised Dutch and German agreements, is exceptional in nature.³¹⁵

Regards the balance between national policy in this area and the internal market, a final word remains to be said on the Austrian book pricing law and the *Libro* case, the most recent on the topic of FBP to come before the court. *Libro* is interesting because through it we can see the progression in the view of the Court made between VBVB in the 1970s and the present day, moving away from a harsh stance against fixed pricing to a quiet acceptance of its existence. *Libro* concerned the Austrian BPrBG³¹⁶ which contained provisions impeding importers from fixing a retail price that was lower than that set by the publisher for the state of publication, or the recommended price for Austria if the foreign publisher has set one. The case concerned the level at which the decision on the level of price-setting takes place; although the law appeared to be non-discriminatory as it provided for publishers to make the price-setting decision for both foreign and national publications for sale on the Austrian market, this was seen as a form of indirect discrimination, since the result was to impede the importers ability to price for the Austrian market. The Court refused to apply the public policy exceptions in the Treaty and did not consider (now) Article 167 TFEU on culture as capable of justifying the provision.³¹⁷ It did, however, consider that the objective of the protection of books as a cultural asset could be a 'mandatory requirement', despite finding that the provision at hand did not meet the proportionality test.³¹⁸

³¹⁵ The test is whether there is an 'influence on the pattern of trade between MS (Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare Di Novara Soc. Coop, Arl (Bpn) and Cassa Di Risparmio Di Genova E Imperia Spa (Carige)*.) The Guidelines reinforce that this phrase is neutral in meaning: even where an agreement increases inter-state trade, it nonetheless affects the pattern of trade and would be subject to the European competition provisions EC - Effect on Trade Guidelines (2004), 33-35. "the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected" *ibid*, 79. The key consideration is whether trade 'is likely to develop differently with the agreement or practice to the way in which it would probably have developed in [its] absence" Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Jacques Pistre, Michèle Barthes, Yves Milhau and Didier Oberti v. Ministère Public* [1997] ECR I-02343.

³¹⁶ C-531/07 *Libro*.

³¹⁷ Note that the Commission in its more recent decision on the eBook agency model stated that "in accordance with Article 167(4) of the Treaty, when applying Union competition legislation in the publishing sector, it should "take cultural aspects into account in its action [...] in order to respect and to promote the diversity of [...] cultures." COMP/AT.39847 -*E-Books Decision Addressed to Hachette Livre SA, Harper Collins Publishers Limited, Harper Collins Publishers, L.L.C., Georg Von Holtzbrinck GmbH & Co. Kg, Verlagsgruppe Georg Von Holtzbrinck GmbH, Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc. And Apple, Inc.* [2012] 12.12.12, 152.

³¹⁸ It should be noted that from *Leclerc* to *Libro* the landscape had been changed somewhat from the *Cassis* to the *Keck* ruling: in *Keck* (1993) whereby the Court introduced a new distinction between selling arrangements and product rules. (Although the Court is by no means consistent in its application of the *Keck* distinctions; in *Mickelsson and Roos* the very same Chamber neglected to distinguish product rules from selling arrangements (see Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008); *ibid*.) It is thereby submitted that, although relevant to a wider analysis of EU law, the distinction is not of particular relevance in the consideration within this present thesis and cannot fully explain the different approaches between *Leclerc* and *Libro* to MEEQRs.)

Even although the provision itself failed the proportionality test³¹⁹, the consideration of mandatory requirements by the Court where it has already determined that the provision in question is discriminatory in nature makes the examination by the Court in *Libro* somewhat exceptional: Following the Dassonville, Cassis and Keck formulas only indistinctly applicable measures should be offered this opportunity³²⁰. Offering a cultural policy justification for such a discriminatory measure is out of canter with a long line of case law.³²¹ Indeed, this means that the cultural exception for the protection of books sits in a distinguished position with environmental concerns as the only other area treated in this way.³²² From this bare fact, we can derive that these two considerations – cultural and environmental protection – are seemingly distinguishable from measures aiming at protecting other concerns, and are of such importance that they warrant a restriction of the free movement of goods even if the provision is discriminatory in nature, provided that it is proportionate. This ‘blurring of the lines’ has been interpreted as an apparent effort on the part of the Court to ‘[countenance] the possibility that cultural justifications might be relevant even where there is direct discrimination.’³²³

What are we to make of all this? Firstly, for agreements, we can safely say that where these are transnational, there will be an effect on trade and the cross-border element must be removed (VBVB - this is a clear application of Article 101). Where the agreement is national, the Commission is inclined to think there is no appreciable effect so long as the provisions do not bind foreign retailers (importers) and do not otherwise induce anti-competitive behaviour (as in the German *Sammelrevers* which led to refusals to supply). Circumvention style clauses do not appear to contribute to the appreciability

³¹⁹ In *Libro*, the provisions of the fixed pricing system at issue fell short of second aspect in particular and, without assessing the aims of this provision of the BPrBG in any greater detail, concluded that “the objective of protecting books as cultural objects can be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which takes the conditions of that market into account.”

³²⁰ Case 8/74 *Dassonville*; Case 120/78 *Cassis*; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

³²¹ As noted in Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ (2011); E Spaventa, ‘Leaving Keck Behind? The Free Movement of Goods after the Rulings in *Commission v Italy* and *Mickelsson and Roos*’ (2009) 34(6) *European Law Review*, p. 876. Sibony and Defossez note: “Alors que l’avocat général dans cette affaire avait conclu, au terme de son analyse de la loi autrichienne, à son caractère discriminatoire et avait donc exclu la possibilité de justifier celle-ci par une exigence impérative, la Cour conclut, de manière surprenante, en sens inverse. Au terme d’un raisonnement quelque peu alambiqué sur le caractère discriminatoire de la modalité de vente en cause dans cette affaire, la Cour accepte d’accueillir la justification avancée par l’Autriche tenant à « la protection du livre en tant que bien culturel »” A-L Sibony and A Defossez, ‘Chronique Marché Intérieur (Marchandises, Capitaux, Établissement, Services) - Services, Établissement et Capitaux (Janvier 2009 – décembre 2009) ; Marchandises (Septembre 2008 – décembre 2009)’ (2012) 48 (1) *Revue Trimestrielle de Droit Européen*. :

³²² In the environmental context, Kingston is of the opinion that the consideration of a mandatory requirement for distinctly applicable environmental measures “implies that the Court, in some cases, equates environmental considerations to Article 30 EC express derogations. As a result, the present situation is, not least from a legal certainty perspective, unsatisfactory.” S Kingston, ‘The Role of Environmental Protection in EC Competition Law and Policy’, (published Doctoral thesis under the supervision of Professor Pf Van Der Heijden, Department of Law, Universiteit Leiden), p. 23 fn 123.

³²³ Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ (2011), p. 896.

of the effect on trade. If a national agreement *was* to have an effect on trade, it may nonetheless seek redemption in the Court's NBA decision. From this, benefits outside the national market where there is a shared language may be taken into account in the context of Article 101(3) if they meet the criteria therein. These factors seem to indicate that the analysis of fixed book pricing agreements is falling into line with that of the free movement provisions, both from a jurisdictional perspective as well as justifications.

For free movement cases, i.e. where a national law obliges FBP, we see from *Leclerc* that the lack of a community policy removes the obligation for national legislation to have to fall into line with the competition provisions. What would otherwise strictly be deemed a restriction of competition is therefore allowed. Further, while the case law seems on the one hand to say that *any (even negligible)* effect on imports or exports will invoke the application of the free movement provisions, this is not the case where the sole purpose of the re-importation is to circumvent the rule. MS are therefore free to design a 'circumvention rule' within their national context. The chosen scope of this exception when adopted in the national context has not been questioned at EU level. Lastly, it seems that even distinctly applicable measures can be subject to justification by an imperative requirement, if proportionate (*Libro*, changing the approach of *Leclerc*).

To the present author, this decision, along with the preceding decision on a similar basis regarding the Dutch FBP agreement and the stance taken in the later decision in *Libro* indicate that the Court is more hesitant than usual to unleash the full wrath of European law upon the publishing industry agreements. As such, it can be said that the industry receives some form of unsaid special treatment when placed back into the bigger picture. What the boundaries of this special treatment, and whether it may extend to the digital industry, remains to be speculated upon, however since these rather precarious decisions of the European Commission, it can be noted that both the German and Dutch national agreements have been transformed into laws, thereby bringing them within the realm of the *Leclerc* ruling and giving them a somewhat more secure footing under the free movement provisions.³²⁴

III. CONCLUSION

The conclusions to be drawn from this chapter are not easy to pinpoint, however there is a clear bottom line: Cultural policy is a national horse in an EU law course and although the nature of the horse cannot be altered, the path it takes can, to a certain extent at

³²⁴ The Netherlands successfully transposed their agreements into law in 2005 (Wet op de vaste boekenprijzen). The 'Buchpreisbindung' (BuchPrG) law was passed in October 2002, by rare unanimity of the German Parliament.

least, be restricted. This observation holds whether we are looking at copyright, VAT or fixed book pricing, although as this chapter shows the exact nature of this relationship is difficult to generalise. The balance found will depend on whether the intervention comes at the legislative or judicial level, and will depend on the area in question since the EU's 'discretionary powers to intervene in the market [are] not akin and [depend] on the application of individual Treaty provisions'.³²⁵ Where matters relating to the book market appear before the CJEU or by the Commission, the tendency is now to be cautious, even lenient, where book policies are to be balanced with EU law. Where instruments of secondary legislation have emerged (the VAT Directive and the Copyright Directive) cultural concerns are written into proposals even pre-dating the Maastricht Treaty. Although these may give MS a lot of deference as to implementation, their interpretation has led to wing-clipping by the Court with the effect that a more robust harmonisation exercise than was perhaps intended has taken place. What we can take from this chapter is that the existing frameworks in place for the regulation of physical books are the result of both the national and EU rules. The introduction of new rules for e-books that disregard either of these elements and break away from the existing frameworks would be inappropriate if there is no due cause for a difference in treatment.

With this background to the interactions between EU and national law, we can also say that in the e-book context the level at which a consideration of equal treatment could play a role in shaping the rules for e-books will vary between the case studies. FBP is the clearest example where it would be for the MS to decide – based on our equality framework rather than national cultural policy – on what treatment is due, due to the lack of a uniform EU framework. This can however already be signalled as a possible problem for our goal of greater consistency between e-book approaches, because the objectives of the rules – our standard for determining likeness – will vary between MS. For exhaustion and VAT, harmonisation has resulted in overarching EU frameworks. However, here we nonetheless see differences in what drives decisions in these areas: for exhaustion, EU harmonisation comes to the purpose of having this rule is to drive the greater EU project. Decisions about whether equality is due would therefore stem from the EU level rather than national discussions. For VAT however, although there is harmonisation by way of the VAT Directive, this is an EU instrument that actually leads to an exemption for States. State policy therefore has a continuing and important role in this field.

³²⁵ De Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (2006), p. 348.

PART II:

CASE STUDIES

It is now appropriate to place our framework into the context of our case studies with a view to determining if equal treatment is a principle to drive the market for e-books.

To test our rule-objective approach with the aim of achieving outcome equality, the next three chapters will look at the areas of exhaustion, VAT and FBP. In each, the existing legal frameworks will be set out, followed by an application of our equality analysis to the case study area. This will involve firstly setting out the objective of the rule in the traditional context, and then testing its 'translational' capacity.

Leading on from this, two further steps are taken in each chapter to round off the analysis. Firstly, current debates and stances are set out with the purpose of highlighting the polarisation of the debates and to introduce the perceived 'likenesses' and 'differences' between physical and intangible books that lead to these viewpoints. Taking these forward, the last sections of each chapter consider the differences between the two formats that are important for the specific case study area and which need to be considered before we can achieve outcome equality.

CHAPTER 5: EXHAUSTION OF INTANGIBLES

INTRODUCTION

The emergence of the doctrine of exhaustion in the European context has been laid out briefly in Chapter 4. The doctrine provides that where an IP protected good is marketed within the EU with the permission of the rightholder, the right to block or control the further marketing of that good elsewhere in the EU is exhausted. The purpose of the doctrine is to allow for a secondary resale market to develop for copyrighted goods that would otherwise have been blocked by exertions of national copyright, in conflict with the free movement intentions behind the European single market.

This Chapter firstly looks at the legal framework, to determine where the unequal treatment of print and e-books stems from (Section I). Moving on to implement our equal treatment analysis in an attempt to guide this riddled landscape, the Chapter then considers the objectives of the exhaustion doctrine (Section II). Finding that these are multi-fold – alongside market justifications there is also a strong free movement motivation for exhaustion – we can see that these do translate into the intangible context. The Chapter then introduces debates about exhaustion so as to introduce the various ways the intangible environment impacts on the distribution and the worries this brings (Section III). Drawing from this the recognition that adjustment will need to be made particularly regarding the ‘reproduction copy’, Section IV then looks at how outcome equality to be achieved in practice.

I. THE LEGAL FRAMEWORK

The development of the principle of exhaustion opened up opportunities for parallel trade in IP protected goods within the internal market.³²⁶ The doctrine of European exhaustion was developed by the CJEU in the 1970s in the context of parallel importation.

This section commences by examining the provisions of the Copyright Directive (CD)³²⁷ and, in the International context, the WIPO Copyright Treaty (WCT)³²⁸, both of which serve to codify the doctrine of exhaustion. It then moves to look at two recent

³²⁶ Case 78/70 *Deutsche Grammophon*.

³²⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (‘CD’) OJ L167/10 of 22.06.2001.

³²⁸ WIPO Copyright Treaty Adopted in Geneva on 20th December 1996 (‘WCT’). <http://www.wipo.int/treaties/en/text.jsp?file_id=295166>, accessed 10.03.2014.

rulings of the CJEU – *UsedSoft*³²⁹ and *Art & Allposters*³³⁰ and what these tell us about the current scope of the doctrine under EU law when it comes to applying it to intangibles.

I. *The Copyright Directive*

Article 4(2) of the Copyright Directive codifies the exhaustion doctrine:

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

There are two difficulties with applying this provision to the e-book context, or indeed any other intangible content. The first is that in the CD, the right to make works available by digital transmissions, whether via streaming or by download, falls under the ‘communication’ right, which can never be exhausted. E-books, as other intangibles, are ‘services’ that are accessed through a licence to use.³³¹ Connected to this categorisation problem, we can see that Article 4(2) clearly uses the terminology of tangible ‘goods’ not intangibles: It refers to the first sale or transfer of ownership of ‘that object’ implying the existence of a tangible item, and further that the terms ‘sale’ and ‘ownership’ apply only to tangible goods. Secondly, we come to a problem that stems from the nature of exhaustion itself: If an intangible downloaded file is to be resold, it is not that particular copy which is being redistributed but a *secondary, reproduction copy*. Article 4(2) does not make any provision for the reproduction right to be waived to allow for this necessary reproduction.

In order to understand the categorisation of digital content transactions within the CD, it is necessary to firstly take a look back to the WIPO Copyright Treaty – concluded in 1996 – that it seeks to implement.

a. The WCT on digital exhaustion

The WCT is important in the exhaustion debate because of its status as an international agreement: Article 216(2) of the TFEU provides that such ‘agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’ and, as a matter of international law, Article 26 of the Vienna Convention on the Law of

³²⁹ Case C-128/11 *Usedsoft*.

³³⁰ Case C-419/13 *Art & Allposters International BV v Stichting Pictoright* [2015] ECLI:EU:C:2015:27, judgment of 22.01.2015.

³³¹ See Chapter 2 Section IV for a discussion of the goods/services division in EU law.

Treaties³³², provides that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ As such, from the moment the WCT was concluded, the EU came under an international law – and EU Treaty – obligation to implement it and ensure compliance with its provisions.³³³ Any alteration to the legal framework to allow for digital exhaustion must therefore take due account of the international level also; if the WCT closes the door for digital exhaustion then we are talking about an even more difficult task than amending the EU framework if equality is necessitated.

At the international level, a specific exhaustion rule is *not* provided for by either the WIPO Copyright Treaties or the Berne Convention. The WCT provides in its Article 6 on the ‘Right of Distribution’ that:

“(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.”

As such, the Treaty leaves it open to contracting States to decide the scope and coverage of this provision, and if they incorporate a doctrine of exhaustion at all.

Moving to look at the possibility for digital exhaustion under the WCT, the WCT does not appear to preclude this although such a claim has certainly been made in the debates surrounding the *UsedSoft* ruling.³³⁴ The first reason for this confusion is down to the apparent boldness of one of the Agreed Statements (AS) to the WCT, AS 6. This clarifies the interpretation of Articles 6 (distribution) and 7 (rental) and specifies that the terms ‘copies’ and ‘original and copies’ subject to the distribution and rental rights ‘refer exclusively to fixed copies that can be put into circulation as tangible objects’.

³³² Vienna Convention on the Law of Treaties (‘Vienna Convention’) Concluded at Vienna on 23.05.1969.

³³³ The WCT and WPPT were the first treaties in the area of copyright to which the EU acceded in its own right, however given that the substance of copyright law a shared competence between the EU MS and the EU itself, both Treaties were equally signed by all MS. As such, from the moment the WCT was concluded, the EU came under an international law – and EU Treaty – obligation to implement it and ensure compliance with its provisions. The CJEU has itself laid out the relationship between EU secondary legislation and international agreements on multiple occasions. In *Commission v. Germany*, it stated that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.” Regardless of the intention of the legislator, international agreements are hierarchically superior to secondary Community law. M Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (Oxford; New York: Oxford University Press 2002), p. 500. Citing Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 35

³³⁴ K Moon (2012), ‘Does Oracle Ruling Breach WIPO Copyright Treaty?’ (The 1709 Blog blog), posted 14.11.2012. <<http://the1709blog.blogspot.co.il/2012/11/does-oracle-ruling-breach-wipo.html>> accessed 12.12.2014.

In the view of the present author, the boldness of this statement is deceiving. Contrary to first appearances, this provision does *not* affirm that the copy-related rights of distribution and rental can only be exhausted where a tangible embodiment of the work exists.³³⁵ In order to understand why this cannot be the case, it is necessary to first consider what the WCT set out to achieve. The Treaty was designed to provide a *minimum* copyright protection for works: The Articles of the Treaty and their associated Agreed Statements set out the very lowest level of obligations that contracting states must adhere to. As such, from the exhaustion and tangibility requirements of Article 6(2) and AS 6 we should understand that contracting states must *at least* provide for the exhaustion of tangibles upon the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.³³⁶ AS 6 does not in fact prohibit the exhaustion upon the first sale or other transfer of ownership of the original or a copy of an intangible work with the authorisation of the author intangible, but simply specifies that *at a minimum* such conduct involving tangibles must be provided for. Member States can choose to provide for this minimum alone, or to expand this also to intangibles if they so wish.

The second reason for confusion is that the WCT includes the ‘making available’ right for digital transmissions under the ‘Right of Communication’, so that both rights are contained within Article 8 WCT. The communication right is not exhaustible and the apparent classification of *all* acts of making available via the Internet as communications would seem to preclude any exhaustion of that right.

This interpretation is incorrect. The WCT was conceived with the digital challenges that the (relative fledgling) Internet was likely to present already in mind and during the preparations for the Diplomatic Conference, it was noted by Dr. Mihály Ficsor, the then Assistant Director General of WIPO, that:

“It is probably one of the most fundamental consequences of the application of digital technology that the borderlines among the right of reproduction, the right

³³⁵ Communications, like broadcasting and performances, are usually thought of as non-copy related acts, because the work is ‘consumed’ immediately and the user need not possess a copy to enjoy the work. In contrast, distributions are copy-related (as are the traditional rights of public lending and rental) because they allow for the copyrighted material to be stored and used at a later time (i.e. use is ‘deferred’). Once an author makes his work available on the Internet, that digital content can either be streamed or downloaded by the user. Streaming is more ‘communication-like’ in nature, insofar as the user has no access to a *copy* of the work, whereas the download option can be thought of as being more similar to a distribution. On cache copies see Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195, judgment of 05.06.2014.

³³⁶ M Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (Oxford: Oxford University Press 2002); Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (2007), p. 57.

of distribution, and the right of communication to the public are getting blurred.”³³⁷

The drafters were aware that the Internet meant that users could do new things with content, which did not clearly fall under the protection of any of the existing exclusive rights for rightholders. In order to preserve the balance between copyright and the interests of users the new exclusive right ‘make works available’ was envisaged as a ‘neutral, legal-characterisation-free description of interactive transmissions.’³³⁸ The reason for its neutrality was that it was unclear whether digital transmissions uploaded by the author and accessed at the will of the user were to be seen as communications or distributions, or as a new ‘hybrid’ act. There was no consensus about this division in the discussions in relation to the WCT. In opposing corners were the US, backing a ‘distribution-like’ right of making available digital works via the Internet and the EU, supporting rather a communication classification.

In the end, the resolution was found in the ‘umbrella solution’, which allowed for contracting states to decide themselves whether the ‘making available’ of works on the Internet fell under the copy-related umbrella (as a distribution or rental), the non-copy-related umbrella (as a communication), or if rather a hybrid solution could be found. Although the ‘making available’ right appears under the communication umbrella in the WCT itself, this should not be taken to mean that digital transmissions must be treated as communications.³³⁹ Instead, from the following statement extract of the US delegation from the minutes – which went undisputed – we can be assured that this is an open categorisation:

“[The making available right] might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights.”³⁴⁰

The result is that, under the WCT, MS may in theory provide for exhaustion of

³³⁷ M Ficsor ‘International Harmonization of Copyright and Neighboring Rights’, WIPO Mexico Synopsism in Mexico, p. 374-377. As cited in Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (2002), p. 205.

³³⁸ See Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (2002), p. 496 at C498.406.

³³⁹ Dr Ficsor however assures that this is quite normal in the context of international treaties.

³⁴⁰ WIPO (1996), ‘Summary Minutes, Main Committee I’, CRNR/DC/102, Geneva, Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, p. 41, para. 301. (emphasis added)

intangibles where there is ‘distribution through reproduction through transmission’³⁴¹ if it chooses that the ‘making available’ of content by download is to fall under the distribution umbrella. However, it should be noted that such an application is limited to the extent that the *reproduction* right cannot be exhausted. The ‘reproduction problem’ with digital content is examined, with a view to resolution, in Section 3 below. To be clear: The WCT does not necessitate an (inexhaustible) communications categorisation of all content accessed via the Internet, whether under a download-to-‘own’ model, streaming or otherwise. The EU therefore had an open choice to place digitally transmitted downloads of intangible content under the distribution umbrella, which could lead to exhaustion provided no other rights are affected.

b. Making available of works via the Internet in the CD as inexhaustible ‘communications’

Sticking to its corner chosen during the WIPO discussions, the EU went on to provide for the new making available right under the ‘communications umbrella’ by placing it within Article 3 of the CD under the title ‘Right of communication to the public of works and right of making available to the public other subject-matter.’ As per Article 3(3) CD, this categorisation means that the right of making available, like the right of communication, cannot be exhausted. Further, the CD contains a recital that appears to specifically exclude exhaustion:

“The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter that are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.”³⁴²

It seems difficult to argue against the EU’s intention to categorise *all* transfers of content via the Internet as communications, regardless of whether they are copy related (and more ‘sale of goods –like’) or non-copy related.³⁴³ Shortly after the WIPO Mexico

³⁴¹ Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation, and Implementation* (2002), p. 486.

³⁴² CD, recital (29).

³⁴³ See footnote 335 above.

City Symposium³⁴⁴ in which the ‘umbrella solution’ was first presented, the European Commission published a Green Paper on Copyright and Related Rights³⁴⁵ (July 1995) and in 1996 it issued a follow-up paper incorporating submissions by interested parties after a period of consultation.³⁴⁶ At first, the Commission seemed to prefer including a right of digital transmission as a form of rental,³⁴⁷ even viewing download-to-‘own’ content that can be stored by the user in this way.³⁴⁸ By 1996 with the Follow-Up Paper, rather than being a form of rental, the Commission now preferred viewing such transmissions as a ‘widely interpreted form of a right of communication to the public’, as was the current interpretation in the ‘vast majority’ of MS.³⁴⁹ It noted that:

“Most Member States and a large majority of parties are against the application of the ‘rental right by extension’ or the ‘distribution right’ of which it forms part. A clear preference emerged to protect ‘on-demand’ transmissions on the basis of the right of ‘communication to the public’ (or a right belonging to this family).”

Thus, the preferred action was clear:

“In view of the outcome of the consultation procedure, it is proposed to protect

³⁴⁴ Ficsor, *The Law of Copyright and the Internet : The 1996 WIPO Treaties, Their Interpretation, and Implementation* (2002), p. 203-206.

³⁴⁵ European Commission (1995), ‘Green Paper : Copyright and Related Rights in the Information Society’, COM(95) 382 final, Brussels, 16.07.1995.

³⁴⁶ European Commission (1996), ‘Communication from the Commission: Follow up to the Green Paper on Copyright and Related Rights in the Information Society’, COM(96) 568 final, Brussels, 20.11.1996.

³⁴⁷ In discussing this new right as a form of rental, the Commission made reference to the definition of ‘rental’ as used in Article 1(2) RLD (1992) the CPD (1991): the ‘making available for use, for a limited period of time and for direct or indirect economic or commercial advantage. As to what is *not* considered a rental in the RLD, a recital provides that “it is desirable, with a view to clarity, to exclude [...] certain forms of making available, as for instance making available phonograms or films [...] for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use; whereas lending within the meaning of this Directive does not include making available between establishments which are accessible to the public”. Directive 92/100/EEC of the Council of 19th November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property (‘RLD (1992)’) OJ L346 /61 of 27.11.1992; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property (Codified Version) (‘Codified RLD (2006)’) OJ L376/28 of 27.12.2006, recital (10).

³⁴⁸ The Commission refers to : “Video on demand, pay-per-view and other new interactive services require an active and specific request on the part of the consumer. A user will be able to consult the works on offer, to change existing data and works, and indeed to store them himself.”

‘The Content Map’, a website created by UK content industry representatives (sponsors include the Alliance for Intellectual Property; recorded music trade body the BPI; the British Video Association; the Department for Culture, Media and Sport; the Federation Against Copyright Theft; findanyfilm.com; the Industry Trust for IP Awareness; the Intellectual Property Office; the Premier League; music sector coalition Pro-music; the Publishers Association; UK Interactive Entertainment Association, and campaigning group Music Matters) splits e-book content availability into the following categories: ‘e-books to own’ (e.g. Amazon, Hive, Apple, Kobo) ; e-books to borrow (e.g. ebooks.com, public library online); downloaded audio books to own (e.g. Amazon, Audible, Audiogo); and other models (including Google Play (cloud service) and Barnowl (subscription streaming service)). For film and TV, it lists: Digital video to buy and keep; digital video to rent/pay-per-view; subscription services; free-to-watch video; and catch up TV. All of these categories can be seen as forms of on-demand transmission.

³⁴⁹ EC - Follow Up Paper on Copyright Green Paper (1996), pp. 12-13.

digital ‘on-demand’ transmissions on the basis of a further harmonised right of ‘communication to the public’. These harmonised rules would be linked as closely as possible to the traditional concept of communication to the public.”³⁵⁰

The Commission made clear even at the early stage of the Green Paper that the key feature framing the categorisation is the physical embodiment – or lack thereof – of the work, not the conditions of access:

“Whether a distribution right is capable of being exhausted by an exploiting act of the rightholder, or a third party with the rightholder’s consent, depends upon the form in which the protected work or related matter is exploited [...] If it is incorporated in a material form it is subject to the rules on free movement of goods and, in consequence, to the principle of Community exhaustion [...] On the other hand, if the work or related matter is not incorporated in a material form but is used in the provision of services, the situation is entirely different. The hearing in July 1994 has already made clear that the interested parties feel that it should be ensured that the rights are not exhausted by the information superhighway. In fact, given that the provision of services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply.”³⁵¹

That this communication cover-all is a continuation of the status quo is reiterated by the EESC Opinion on the Green Paper³⁵² and is easy to see from the fearful submissions of stakeholders³⁵³ why the Commission opted for the inclusive definition covering also ‘sale-

³⁵⁰ Ibid, p. 14.

³⁵¹ EC - Copyright Green Paper (1995), pp. 47-48.

³⁵² “Existing Community legislation [i.e. the RLD and CPD] provides that the principle of exhaustion of rights only applies when these are incorporated in physical products, not, however, to its distribution in electronic form.” Economic and Social Committee (1996), ‘Opinion of the Economic and Social Committee on the Green Paper - Copyright and Related Rights in the Information Society’, OJ C97/9 of 01.04.1996, Brussels, Opinion of 31.01.1996, point 5.2.2.

³⁵³ In response to question 2(d) of the Commission consultation, which also captures the essence of this thesis almost 20 years on (‘Should the same rules apply to products and services which are distributed in the form of physical copies and those which are distributed on-line?’), the European Publishers Council considered the question in the following way and highlighted the consequences of the move from tangible to intangible: “At present, one can distinguish between (1) “fixed media” or “off-line” products (e.g. games or information products stored on CD-ROM) which are sold in tangible form and (2) “interactive” or “on-line” services (e.g. information databases, Teleshopping and ‘Video on Demand’) which are or will be provided via the “superhighway” involving a greater or lesser degree interactivity with the consumer. However, that distinction becomes blurred as it becomes possible to purchase the same product (e.g. a video or computer program) from a shop in tangible form or to buy it by downloading it from the “superhighway” into some tangible form e.g. a computer disc. [...] It must be remembered that publishers of interactive products distributed in the form of physical copies have less control over their subsequent re-exploitation than is the case with on-line redistribution. Also, although the concept of ‘exhaustion of rights’ in relation to physical copies embodying copyright works is well established in Community law, it becomes problematic in relation to ‘copies’ which are communicated via a network from one computer to another. Clearly, a data provider would be most concerned if a copy of a work sent to, or accessed by, a user, and held in the recipient computer’s memory, would be regarded as having exhausted the data provider’s rights to control further exploitation of data in that copy by the recipient e.g. by the latter’s redistribution. To that extent, the regimes need to make appropriate distinctions. [...] Some EPC

like' downloads; it is the 'safe' route from the perspective of copyright holders and at the time of the Green Paper or the Follow-Up no real investigation had been carried out regarding the qualitative and quantitative impacts of digital exhaustion.³⁵⁴ Categorising digital on-demand transmissions as communications brought with it the consequence that no exhaustion would take place once transmitted to the user: this was the will of 'a large consensus' of stakeholders, 'given that services can in principle be repeated an unlimited number of times the exhaustion rule cannot apply'³⁵⁵. Again, a 'large number' of interested stakeholders called for legislation to explicitly that 'the right applicable to the provision of online services may not be subject to exhaustion'.³⁵⁶

Heeding the calls of stakeholders, the intention behind the CD appears to be to differentiate all forms of digital content transfers (regardless of whether these are through downloads, streaming or subscription/lending models) from sales of tangible goods. The CD effectively blocks exhaustion of content transmitted online by categorising it across-the-board as a communication, regardless of the fact that download-to-own content may be, put simply, less service-like and more good-like.

2. *The UsedSoft and Art & Allposters rulings: Can only physical goods be 'sold' to be exhausted?*

There are two rulings of relevance when considering the scope of exhaustion in the EU sphere. Firstly, we will look at the UsedSoft case³⁵⁷, which emerged as a preliminary reference to the CJEU from the German Bundesgerichtshof regarding the application of the exhaustion doctrine to software downloaded via the Internet. As has been noted, exhaustion occurs only in the case of distributions where there has been a 'first sale' or 'other transfer of ownership'.³⁵⁸ However, in UsedSoft the CJEU found that 'sales' and 'ownership' exhausting the distribution right could also cover transfers of intangible

members consider that the question cannot be answered with a simple yes or no. There are certain non-intellectual property laws which should apply to physical and non-physical copies, e.g. those regarding data protection, consumer protection and defamation. On the other hand, there may have to be different kinds of rules in some cases in order to ensure the same level of protection for different forms of the same product. The guiding principle should be that the same legal principles apply equally to products and services distributed either in the form of physical copies and/or on-line." European Commission (1994), 'Replies from Interested Parties on 'Copyright and Neighbouring Rights in the Information Society'', Brussels, Hearing of 07-08/07/1994, pp.153, 156 (Response of the European Publishers' Council (EPC)).

³⁵⁴ For example: "Digitisation allows an extremely large volume of data and information to be stored in the same material form ("digital compression"), and to be transmitted very easily. This means that it has become a great deal simpler to obtain strictly identical copies, to disseminate them in immaterial form, and to manipulate works by sampling or colourisation for example." EC - Copyright Green Paper (1995), point 65.

³⁵⁵ EC - Follow Up Paper on Copyright Green Paper (1996), pp. 18-19.

³⁵⁶ Ibid, p. 19.

³⁵⁷ Case C-128/11 *Usedsoft*.

³⁵⁸ Both the WCT and CD refer to the 'first sale or other transfer of ownership' while the CPD refers only to the 'first sale'

content.³⁵⁹ The ruling concerned the Computer Programs Directive (CPD) – which the CJEU took care to point out was *lex specialis*³⁶⁰ – and not the CD, however it has nonetheless brought much speculation about a possible broader application to non-software content. This speculation may have been brought partly to rest by the more recent *Art & Allposters* ruling, which was decided by the CJEU in January 2015. This judgment seems to confirm that only physical goods can be ‘sold’ or ‘transferred’ for distribution leading to exhaustion. Nonetheless, this may not be the end of the story: although *Art & Allposters* concerns the CD it is not directly concerned with the digital context.

a. UsedSoft

The *UsedSoft* case arose when UsedSoft started offering a platform for Oracle’s software to be ‘resold’. Anyone interested in using Oracle’s software could download this from the Oracle website and upon conclusion of a user agreement – giving a ‘non-exclusive and non-transferrable user right for an unlimited period for that program’ – could use that software. The technicalities of the contested ‘resale’ were such that, when the first acquirer chose to resell the software via UsedSoft, he was actually only reselling the *user agreement* and not the copy of the software which he downloaded from the Oracle website. Thus, through UsedSoft the second acquirer would actually only have the user agreement transferred to him; he would take it upon himself to download the software from the Oracle site. To use the software, the second acquirer would require both the ‘second-hand’ licence and the newly downloaded copy of the software.

To understand the relevance of the case here, we need to first look at the CPD and how it differs from the CD. Article 4(1)(a) CPD provides that any ‘permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole’ can only be undertaken with the authorisation of the rightholder. The distribution right is to be found in Article 4(1)(c), which gives the author the right to control ‘any form of distribution to the public, including the rental, of the original computer program or of copies thereof.’ The principle of exhaustion is also codified in the Directive, and like the CD it appears in Article 4(2). These provisions are in line with those of the CD, however the CPD contains an additional formulation in its Article 5(1), which is not replicated in the CD. This is a qualification on the exclusive right of reproduction so that authorisation by the rightholder is not required if the reproduction is ‘necessary for the use of the computer program by the lawful acquirer in accordance with its intended

³⁵⁹ In *Phil Collins*, the Court drew attention to the unique characteristics of IP but refused to take a formal approach to their classification: although clear IP-related trade would fall within the scope of the treaty, it did not take a definitive stance on whether this was within the goods or services framework Joined Cases C-92/92 and C-326/92 *Phil Collins*, [27].

³⁶⁰ Case C-128/11 *Usedsoft*, [51].

purpose, including for error correction.’

In the *UsedSoft* ruling, the CJEU reached its conclusion that the ‘resale’ of the downloaded software was lawful by taking two steps. Firstly, it categorised the transaction as a ‘sale’ rather than a licence, therefore meaning a ‘distribution’ for exhaustion could take place. Secondly, it utilised Article 5(1) to overcome the reproduction right that it though was implicated by any re-distribution of the software. It can be noted that this second step was not strictly necessary in the context because the software was not actually reproduced without authorisation; only the licence was transferred in the ‘resale’ transaction, while the download was a new download – with authorisation – from Oracle’s website directly. Nonetheless, the logic of the Court was such that the ‘conclusion of a user licence agreement for that copy form an indivisible whole which, as a whole, must be classified as a sale’; what was a ‘licence’ for Oracle was in the view of the Court distribution through a transfer of ownership, meaning that exhaustion could take place.³⁶¹

Underlying this finding was the sentiment that the purpose of the exhaustion can be transferred into the digital context: If the Court had ruled otherwise, ‘the effectiveness of [exhaustion] would be undermined, since suppliers would merely have to call the contract a ‘licence’ rather than a ‘sale’ in order to circumvent the rule of exhaustion and divest it of all scope’.³⁶² The Court draws attention to the fact that the conditions for access and subsequent use meant that obtaining material on physical CD-ROMs or via downloads from a website were comparable for consumers; ‘it makes no difference’ what method is used because ‘[t]he on-line transmission method is the functional equivalent of the supply of a material medium’³⁶³.’ Until this point, the ruling can be read as a re-categorisation from downloads as ‘communications’ to downloads as ‘distributions’, based on their good-like characteristics. *UsedSoft* sets out a ‘sliding scale’ of likeness, based on perpetuity of access and remuneration to the rightholder: the more ‘sale-of-good-like’, the closer intangibles are to transfers of physical goods.

However, in saying this, the Court has a practical problem that it needs to solve in a second step: It is all very well saying that a download can be a distribution, but in order to resell that download it is necessary to make a reproduction copy, and the reproduction right cannot be exhausted. It is at this point that the ruling relies heavily on the provision of Article 5(1) of the CPD. Under this provision, where there is a *distribution* there is right that can be exhausted; when exhausted, any subsequent acquirer

³⁶¹ Ibid, [84].

³⁶² Ibid, [49].

³⁶³ Ibid, [61] and [47] respectively.

becomes a ‘lawful acquirer’ within the meaning of Article 5(1). That second acquirer can then, as provided by Article 4(1)(a), make any reproduction ‘necessary for use’ without the authorisation of the rightholder.

If the *UsedSoft* decision was decided under the CD, the Court’s modicum of creativity in overcoming the reproduction copy hurdle could not have been conceived because – private copying aside³⁶⁴ – there is no allowance for a ‘lawful acquirer’ to create a non-transient reproduction copy without the authorisation of the rightholder. Outside of the CPD, the CJEU will have to deal with the preference of the EU legislature to categorise services as communications, for example under the CD. While in *UsedSoft*, the Court essentially turns the digital downloads into a distribution and dealt with the reproduction right accordingly so as to enable the exhaustion to take place, this route will not be so easy to come by in the CD context.³⁶⁵ Nonetheless, as section II of this chapter argues, when read against the bigger picture of exhaustion as a doctrine the *UsedSoft* ruling does not necessarily feign into insignificance. Instead, purposively exhaustion seeks to achieve certain objectives which cannot be achieved if the provisions of the CD are applied instead using a literal or teleological interpretation.

b. Art & Allposters

The *Art & Allposters* case arose when copyrighted pictures printed on posters and distributed with the authorisation of the rightholder were transferred onto canvas and the Internet and sold by Allposters. The case is of interest to us here because both Advocate General Cruz Villalon and the Court found that the distribution right in Article 4 CD could only be exhausted in relation to a tangible copy. Referring to this article as well as recital 28 CD, the Court found that:

"[T]he EU legislature, by using the terms ‘tangible article’ and ‘that object’, wished to give authors control over the initial marketing in the European Union of each tangible object incorporating their intellectual creation.”³⁶⁶

This interpretation is in line with the commentary on the CD above and supports a reading of the CD through which exhaustion can only be applied to tangibles as a result of the legislative intent. However, following on from this, the Court proceeded to state

³⁶⁴ The Berne Convention allows exceptions and limitations to the reproduction right, providing they meet the conditions of the ‘three step test’. Article 5(b) of the CD permits MS to provide for an exception to the reproduction right for “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation.” Reproductions for resale purposes, as were at issue in *UsedSoft*, would clearly not fall within the scope of this exception.

³⁶⁵ Moon (The 1709 Blog 2012).

³⁶⁶ Case C-419/13 *Art & Allposters*, [37].

that such a finding is ‘supported by international law, and in particular by the WIPO Copyright Treaty.’³⁶⁷ That such reference to the WCT would be given by the Court when interpreting the CD was already indicated in *UsedSoft* (at paragraph 60), although why the Court does not find that this interpretation of the international instrument applies also to the CPD remains a mystery.

In addition, as has been noted,³⁶⁸ it is the view of the current author that this is not the correct interpretation to be attributed to AS 6 of the WCT; rather, this AS provides for a minimum level of protection and it is rather the ‘reproduction copy problem’ that digital exhaustion has a bone to pick with. Such misinterpretation of AS 6 at this point in time and attributing a blockage to digital exhaustion in the WCT when this is not the case may mean that any alteration to the CD to allow for such exhaustion will prove overly arduous for the legislature since it would now seem to require a change also at the international level. It is worth recalling here that the EU is under a good faith obligation to implement the provisions of the WCT; although the intentions of the legislature may have differed between the CD and the CPD, in denying the WCT allows digital exhaustion at all, the Court is also effectively saying that the CD – which applying its very own *UsedSoft* ruling allows intangible exhaustion – is in breach of the Treaty obligations. Thus, for a ruling which at first sight does not say anything about digital exhaustion explicitly, *Art & Allposters* does in fact reveal a lot about how the Court interprets Article 4 CD: Exhaustion in this context is – quite in contrast to the CPD dealt with in *UsedSoft* – limited to tangible copies.

II. EQUAL TREATMENT ANALYSIS

This section looks at both the general and internal market objectives of exhaustion and then moves on to consider whether these transfer into the intangible context. It is argued that the strict division between tangible goods and intangible services in the CD is not justified and undermines the purpose behind exhaustion as a doctrine of the CJEU; when this purpose is given due attention, it can be seen that its objectives can be carried through into the intangible context.

I. *The objective of exhaustion*

There are several strands underlying the purpose of the doctrine of European exhaustion. On the one hand, we can consider numerous market focussed elements. These can be divided into the property theory, marketability theory, remuneration theory and legal

³⁶⁷ Ibid, [38].

³⁶⁸ See section I.1.a above.

certainty. These objectives can also be found to underlie the US first sale doctrine³⁶⁹ and other national justifications for similar provisions. On the other hand, there is an objective behind European doctrine specifically: Internal market completion. Both the general market and EU internal market objectives should be looked at cumulatively, as evidenced by the case law of the CJEU.

a. General theories of exhaustion

The property theory behind exhaustion is naturally least important for this work because the conflict between the immaterial rights over the subject matter of IP and the material rights in physical goods that it seeks to reconcile are not of relevance in the context of intangible downloaded content. The rationale behind the property theory is that it attaches the distribution right over immaterial ideas to a physical copy; where there is a transfer of ‘ownership’ over that copy from the rightholder to the first owner, the distribution right is exhausted; it ‘gives way’ to the property right of the owner and is then dealt with under physical property terms.

The remuneration theory is that the first sale provides the rightholder with sufficient remuneration; to be remunerated unlimited times for ‘sales’ of a work because no secondary channel exists would be to retain a monopoly that goes beyond what is justified by the IP right.³⁷⁰ Exhaustion is a payoff between authors and users: the remuneration theory rationale is that once a rightholder has availed him or herself of the opportunity to gain remuneration for his or her work, the rightholder has no real bones to pick against the system: it is then for exhaustion to step in and re-balance, post-remuneration, the interests of rightholders and users by opening up the secondary market. This leads into the interconnected marketability theory.

The marketability theory says that exhaustion avoids the ‘inappropriate hampering of

³⁶⁹ In the US context, Perzanowski and Schultz note 6 objectives: 1) access through increased affordability and availability; 2) preservation and avoidance of permanent loss; 3) privacy because permission is not required from the copyright holder for each transaction; 4) transactional clarity because the copyright permissions are standard; 5) increased innovation because rightholders have to innovate to compete with secondary market, new business models can develop and products can be modified in the second hand market to increase value; 6) encourages platform competition and reduces lock-in because consumers can alienate their purchase to regain some of their value and are incentivised to switch providers. A Perzanowski and J Schultz, ‘Digital Exhaustion’ (2011) 58 UCLA Law Review.

Uetz is more straightforward: “First, it makes copyrighted works more affordable by allowing secondary markets to exist outside of the control of copyright owners. Second, it increases the availability of works by giving consumers access to works that the copyright owner has stopped distributing. Third, it preserves the privacy of consumers”. JP Uetz, ‘The Same Song and Dance: F.B.T. Productions, Llc v. Aferma Th Records and the Role of Licenses in the Digital Age of Copyright Law’ (2012) 57 Villanova Law Review, pp. 185-186.

³⁷⁰ A Wiebe, ‘The Economic Perspective: Exhaustion in the Digital Age’, in Lionel Bently, Uma Suthersanen, and Paul Torremans (Ed.), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010).

trade in copies'.³⁷¹ It is essential to view intellectual property in light of dynamic competition; IP is there to provide an incentive to innovate by granting limited exclusivity.³⁷² Once a protected item is sold, that exclusivity no longer has protective value; the acquirer is able to distribute that copy as he so pleases and in doing so '[h]e exposes the right holder to full price competition'.³⁷³ Exhaustion provides that where copy has been marketed (and the author remunerated) it is locked up; without the principle, purchasers would be unable to alienate their copy because of the continuing distribution right held by the rightholder. This would make their investment a pure loss, without resale value. Allowing for a 'second-hand market of ideas'³⁷⁴ on the other hand opens up the content to further distribution

Alongside the economic benefits of creating a secondary market, there are also general interest rationales for making protected works more accessible and more affordable. Further, exhaustion challenges the monopoly of rightholders over works; this brings the consequence that although on the first sale market purchasers are bound to the chosen sales channels of the authors, on the secondary market this is not the case. Broader distribution in particular safeguards privacy concerns. Although probably little thought of, this has been important historically and continues to be so where content is of a politically delicate nature.³⁷⁵

Finally, legal certainty is an objective of the doctrine because exhaustion always solves the 'conflict' between intellectual property and property in favour of the latter.³⁷⁶ Although this resolution may be disputed, it makes the legal status of copies clear because it allows resale consistently across all physical property, regardless of whether it contains IP protected content or not. Any differentiation would risk normative confusion for consumers.

b. Internal market completion

The European exhaustion doctrine was conceived by the European Court with another objective in mind that should be read alongside those already mentioned. Exhaustion ensures the proper functioning of the European internal market and solves the conflict between free movement and territorial grants of copyright:

³⁷¹ *ibid*, p. 322.

³⁷² See generally Perzanowski and Schultz, 'Digital Exhaustion' (2011).

³⁷³ Wiebe, 'The Economic Perspective: Exhaustion in the Digital Age' (2010).

³⁷⁴ T Targosz, 'Exhaustion in Digital Products and the "Accidental" Impact on the Balance of Interests in Copyright Law', in L Bently, U. Suthersanen, and P. Torremans (Ed.), *Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Cheltenham: Edward Elgar Publishing 2010), p. 343.

³⁷⁵ Perzanowski and Schultz, 'Digital Exhaustion' (2011), p. 896.

³⁷⁶ Targosz, 'Exhaustion in Digital Products and the "Accidental" Impact on the Balance of Interests in Copyright Law' (2010), p. 344.

“The balance between territoriality and the functioning of the internal market has been achieved, as far as the distribution of physical copies is concerned, by the principle of exhaustion developed by the CJEU.”³⁷⁷

European exhaustion was originally developed in the context of parallel trade and the free movement of goods (Articles 28 and 30 TFEU) as a way to safeguard competition and prevent distortions by way of ‘isolation of national markets’, which would be ‘repugnant to the essential purpose of the Treaty.’³⁷⁸ Limitations on the free movement protected by the exhaustion rule are only permitted where necessary for ‘safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned.’³⁷⁹ European exhaustion is, therefore, a doctrine that seeks a *balance*.

Exhaustion as a doctrine has now been codified through legislation in the form of Directives.³⁸⁰ Westkamp, while describing the exhaustion doctrine of the Court as a ‘flexible formula, or collision clause’ a ‘rule that, methodologically, resulted in a balancing exercise’³⁸¹, argues that this flexibility is undermined by the rigid wording of the secondary legislation codifying it, which ‘has caused a concoction of these principles and has led to the misguided view that exhaustion remains a narrow limitation applicable to acts of physical sales.’³⁸²

When considered light of the underlying free movement aims, it seems that ‘copyright must justify itself and fit in with the free movement rules’³⁸³. With *UsedSoft* in mind, this indicates that the legal blockages to e-exhaustion (from the EU legislator or the WCT) can in reality cause but a little stir in the wider vision of the European Court. It is

³⁷⁷ De Wolf and Partners (Funded by the European Commission), ‘Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the ‘Infosoc Directive’), DOI: 10.2780/90141, at p. 23.

³⁷⁸ Case 78/70 *Deutsche Grammophon*, [12-13]. Parallel imports take place when a IP protected product is lawfully sold on a given market and then imported into another territory for re-sale, usually because price differentiation between markets leaves substantial room for profit. The European exhaustion doctrine decreases the appeal of price-discrimination between European marketplaces by copyright holders because it is competition enhancing; it creates the possibility for (cheaper) parallel imports to be sold in competition with (authorised) sales by national suppliers.

³⁷⁹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd et al. v QC Leisure et al. And Karen Murphy v Media Protection Services* [2011] ECR I-09083, [106] and cases cited therein; Case C-128/11 *Usedsoft*, [63].

³⁸⁰ Computer Programs Directive (CPD), the Rental and Lending Directive (RLD) and the Copyright Directive (CD).

³⁸¹ G Westkamp, ‘Emerging Escape Clauses? Online Exhaustion, Consent and European Copyright Law’, in Jan Rosén (Ed.), *Intellectual Property at the Crossroads of Trade* (Cheltenham: Edward Elgar 2012), pp. 43-44.

³⁸² *Ibid*, p. 52.

³⁸³ P Torremans, ‘The Future Implications of the *Usedsoft* Decision’ CREATE Working Paper 2014/2, February 2014, p. 7. <<http://www.create.ac.uk/wp-content/uploads/2014/01/CREATE-Working-Paper-2014-02.pdf>>, accessed 08.10.14.

interesting to note here the difference in stances between the CJEU in this case and the US District Court in *ReDigi*.³⁸⁴ The latter's finding can be seen as firmly rooted in copyright; not the US Copyright Act alone, but also the Copyright Clause in the Constitution which grants Congress the express power to enact copyright laws "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"³⁸⁵. An interpretation of the first sale doctrine to alter the wording of 'that copy' and implicate the reproduction right also would imply a reading beyond the express word of the written law. While the US Court seemed to consider there might be some need for exhaustion to apply to certain digital situations, it did not feel it was appropriate to take such a decision and instead deferred to Congress to decide if physical limitations on the first sale doctrine were indeed 'outmoded'³⁸⁶.

It is due to the 'fundamentally different logic'³⁸⁷ behind the EU approach as compared to the US one that e-exhaustion could be placed firmly on the table in light of the very objectives of the doctrine itself. Despite the legal surrounds, particularly as far as the CD would appear to expressly prohibit digital resale, a purposive interpretation of the exhaustion doctrine as an enabler free movement, regardless of whether that free movement concerns physical objects or digital downloads, could be the norm leading digital exhaustion onwards.

2. *Do the objectives translate to e-books?*

When exhaustion is considered through the lens of the objectives above, it seems that the principle still has life in it in the digital, intangible environment. The sole theory which seems to go against this finding is the property theory, insofar as there is no tangible embodiment against which acquirers can exert property rights; however, this is

³⁸⁴ United States District Court Southern District of New York *Capitol Records Llc v Redigi Inc.* The *ReDigi* case before the US District Court of New York concerned the resale of music downloaded from iTunes, although in contrast to the UsedSoft scenario the original downloaded file was 'migrated' from the first user's computer to *ReDigi*'s cloud based server and the first user could then choose to keep it stored there to be accessed via streaming (whereby no copy would be downloaded) or to offer it for resale. If resold, access by the first user is blocked and the second user can download the file onto his or her device rather than depending on the original acquirer to delete it. The similarities from a layperson's perspective are convincing and particularly with no knowledge of the specific legal frameworks differentiating between different types of format and content, it is understandable why many jumped on these two cases and took them under one wing. When the US District Court did rule in *ReDigi*, it found there to be two breaches of the reproduction right: When the upload to the cloud takes place and when the new owner re-downloads the file. The US Court held that 'the unauthorised transfer of a digital music file over the internet – where only one file exists before and after the transfer – constitutes a reproduction' (p 5) It asserted that it is 'the creation of a new material object, and not the creation of an additional material object, that defines this right' (p 6). This is in stark comparison to CJEU's lack of willingness to deny 'effective use' because the user would be blocked by the inability to make a reproduction copy without authorisation. It should be borne in mind that this is a district court decision and is not final. However, at this point an appeal seems unlikely due to the financial constraints of the defendant.

³⁸⁵ Article I, Section 8, Clause 8 of the United States Constitution.

³⁸⁶ *ReDigi*, p.13.

³⁸⁷ Torremans, 'The Future Implications of the Usedsoft Decision' (2014), p. 3.

only the case insofar as the physicality is concerned. If we are considering exhaustion to apply to a purchase of a work, even if this is intangible, the theory remains solidly in place to ‘break’ the linkage between the author’s intellectual property rights and the wider circulation of the work.

Concerning the remuneration theory, at least on the abstract level the objective of balancing the author’s interest in remuneration against the general interest in wider circulation is preserved regardless of whether we are talking in terms of physical goods or download-to-own services. Where the payment is ‘designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor’ and the access given in return is on a perpetual basis, the author has according to this theory been paid his dues and – in the general interest – should not be able to continue to exert a monopoly. As examined in the next section, the trick in the digital environment is in determining when a remuneration does correspond to the economic value, particularly so since – at present – what are essentially ‘licences to use’ can be sold at the same price, or only marginally lower prices, than physical books. As in the physical environment, it should be the case that communications - rentals, loans, etc – should not lead to exhaustion.

However as under the CD *every* transaction is categorised as a communication the distinction in the digital landscape is blurry. While it is clear that ‘all you can read’ subscription services or streaming are not intended to ‘[enable] the rightholder to obtain an appropriate remuneration’, the price point for download-to-‘own’ services is unclear given that exhaustion does not currently occur.³⁸⁸ Given that e-book prices are often as high, or in the region of the print book price this does seem to be the strategy of rightholders even without exhaustion. If the current level is not sufficient to retain remuneration then exhaustion may see the price rise, although in the opinion of the current author this occurrence would seem doubtful.

The marketability theory behind exhaustion also seems to carry through into the e-book context. The pure loss associated with the current lack of exhaustion is a clear source of frustration for consumers – particularly where the price points for e-books are the same as, or very close to, those of print books. Opening up the secondary market would lead to competition, incentivising innovation in the same way as occurs on the physical book market; in fact, this is likely to be all the more so because in the e-book context the copies between the first and second sale are identical. The second hand digital market is

³⁸⁸ On databases, see RM Hilty, K Köklü *et al.*, ‘Software Agreements: Stocktaking and Outlook – Lessons from the Usedsoft v.Oracle Case from a Comparative Law Perspective ’ (2013) 44 (3) International Review of Intellectual Property and Competition Law, p. 287.

in perfect competition because ‘used’ e-books do not look worn; they cannot be ripped or coffee-stained and do not depreciate as physical books do. This change in position brings concerns from rightholders that are examined in the next section, but at least in theory the competition-enhancing justification for exhaustion remains.

Alongside this, it is plain that exhaustion in the digital environment would also serve to alleviate the same affordability and accessibility concerns as would be present on the physical market if resale was not allowed. Transactional privacy is important – if not more important – in the digital context and for consumers ensuring that a choice of sales avenues is available outwith those of the rightholder may be important even if these themselves cannot ensure anonymity.

The case law of the Court which is cited as a refusal to apply the doctrine to services broadcasting and communications to the public does not necessarily mean that the doctrine is always going to be applicable³⁸⁹; in some circumstances e-books will act like communications and are reimbursed as such. In such circumstances exhaustion is not justified. However, in download-to-own situations the ‘sale-like’ nature of the transaction means that exhaustion should apply. This is the viewpoint the Court seems to take in *UsedSoft* when it finds that to categorise perpetual digital transfers to content otherwise would mean that ‘the effectiveness of [exhaustion] would be undermined, since suppliers would merely have to call the contract a ‘licence’ rather than a ‘sale’ in order to circumvent the rule of exhaustion and divest it of all scope’.³⁹⁰

In the internal market context exhaustion is just as necessary in the digital environment as in the physical one, if not more so because territorial barriers are being built by retailers, but also publishers and governments, as we will see in the case of the e-book fixed pricing law in France. These actions disable the consumers’ choices to make use of the potential of the digital market and the transparency of offers it provides. Exhaustion in this respect is an essential step to realising the potential for digital content to flow freely throughout the EU, as it has done for copyrighted works in the physical context.

III. DEBATES AND STANCES

This Section aims to highlight the debates surrounding the exhaustion issue by looking at some Court cases since *UsedSoft* where exhaustion has been brought up, as well as the

³⁸⁹ B Farrand, ‘The Pan-European Licensing of Digital Music: The Effect of the Harmonisation of Copyright’, (published PhD under the supervision of, Law, European University Institute).

³⁹⁰ Case C-128/11 *Usedsoft*, [49].

responses to the European Commission's 'Copyright Review'.³⁹¹ These cases and responses are particularly useful because they highlight specific fears about the ways that intangibles are qualitatively or quantitatively different from tangibles and how these impacts could upset the balance of the rules if a simple cross-application is made without adjustment to the intangible environment. For example, one such fear is that if technology cannot currently guarantee deletion of the original copy then an *additional* copy will come into circulation for which the rightholder is not remunerated. In this sense, these responses already set the scene for the final Section of this Chapter (Section IV), which looks at the impacts of e-books that need to be 'neutralised' for outcome equality to be achieved.

I. *National case law dealing with intangible exhaustion*

a. German Regional and Higher Regional Court rulings against e-exhaustion

Since *UsedSoft*, in Germany there has been a regional court decision (of the Landesgericht Bielefeld)³⁹² to the effect that the CPD is *lex specialis* and therefore the *UsedSoft* ruling does not have any effect on the interpretation of the CD.³⁹³ An appeal to a higher regional court (the Oberlandesgericht Hamm) has also upheld this finding.³⁹⁴ The action in this case was brought by a German 'umbrella' consumer organisation, which alleged that the terms and conditions for downloads of audio and e-book files provided by an unnamed online retailer restricted use and unreasonably disadvantaged consumers within the meaning of the German civil code to the extent that the attainment of the purpose of the contract was jeopardised. The disputed clause blocked resale by providing that 'the customer acquires the simple, non-transferable right to use the title offered for personal use only'. The applicant argued that placement of e-books and audiobooks on the website and the use of 'physical goods' language employed would lead consumers to download them in good faith that they would have the same usage rights as for print books or CDs. Further, the contract terms went against the exhaustion principle set out in the German Copyright Law³⁹⁵, which read in line with *UsedSoft* should mean that both tangibles and intangibles should be resalable.

The Regional Court dismissed the action as unfounded, a position that was later upheld on appeal. It highlighted that the primary purpose of the contract was to allow the

³⁹¹ EC - Public Consultation on the Review of the EU Copyright Rules (2013). EC - Report on the Responses to the Public Consultation on the Review of EU Copyright Rules (2014).

³⁹² Landgericht Bielefeld 4 O 191/11 [2013]. See E Linklater, 'E-Books Distinguished, Not Exhausted' (2013) 8 (9) Journal of Intellectual Property Law & Practice.

³⁹³ E Linklater (2013), 'Waiting for a Lower Court to Reign in Resale? You'd Sooner Herd Cats' (The IPKat blog), posted 01.05.2013. <<http://ipkitten.blogspot.co.uk/2013/05/waiting-for-lower-court-to-reign-in.html>> accessed 12.12.2014; Linklater, 'E-Books Distinguished, Not Exhausted' (2013).

³⁹⁴ Oberlandesgericht Hamm Urt. v. 15.05.2014, Az. 22 U 60/13 [2014].

³⁹⁵ Set out in Section 17.2 Urheberrechtsgesetz (UrhG).

consumer access to the content for personal use, and as such the defendant is only contractually responsible for facilitating the download so that the content can be stored on the consumer's local disk to be accessed by them at their will; the purpose is not endangered by disallowing resale. Interestingly, the Court rejected the applicant's claims regarding consumer expectations by reasoning that because consumers know about the piracy problem and digital copies don't degrade with use, they expect that they *won't* be allowed to pass on their copies and anticipate that all they will get from the contract is the ability to download the content and the right to its personal use. The German decisions also balanced the interests at stake, finding that the defendant's interest in preventing an uncontrollable and potentially infringing secondary market outweighs the consumer interest in establishing such a market.

On the specific issue of exhaustion and the interpretation of *UsedSoft*, both German Courts approached this from the perspective of the creation of a reproduction copy necessary for local access. For a file to be resold, a further copy must be made; the distribution right must be exhausted, but also the acquirer must have the ability to lawfully reproduce a copy to enable use. It is here that the CD blocks exhaustion, unlike the CPD. Without any provision allowing for reproduction without authorisation where necessary for use, there can be no exhaustion under the German copyright law which essentially implements the CD. In essence, the German decisions on the exhaustion issue outside the realm of software were that *UsedSoft* has no possibility for cross-application to the CD.

b. Dutch Courts on e-exhaustion

In July 2014, the District Court of Amsterdam ruled in contrast to the German Courts that downloaded e-books could be considered as equivalent to paper books and therefore could be subject to exhaustion, cross-applying *UsedSoft*.³⁹⁶ The Groep Algemene Uitgevers (GAU, the General Publishers Group) brought a case against Tom Kabinet for creating a 'marketplace' to buy and sell 'used' e-books on its website. The arguments of applicant mirrored those in the German case above; *UsedSoft* could not be cross-applied to the CD because CD did not contain the provisions of the CPD that allowed a finding of exhaustion, and that the acts of reproduction necessary for the process could not be achieved without permission. Tom Kabinet argued that its system ensured that the resold copies were legitimately purchased and that – like the software in *UsedSoft* – they had been acquired through a perpetual licence equivalent to a sale. Further, it was argued that watermarking would minimise if not eliminate risks of

³⁹⁶ Case C/13/567567/KG ZA 14-795 SP/MV *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet* [2014] District Court of Amsterdam, 21.07.2014

further circulation and that the system did not actually involve any reproduction,³⁹⁷ similar to the system used by *ReDigi* in the US.

The Dutch court placed emphasis on the CJEU's reference in paragraph 62 of *UsedSoft* to the objective of exhaustion, being 'to avoid partitioning of markets, to limit restrictions of the distribution of [...] works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned.' The steps taken by Tom Kabinet ensured continuing protection and did not infringe the law; as such, the Court saw fit that exhaustion doctrine apply to the intangible downloaded e-books as it would to physical books.

Predictably, the case was appealed. On 20th January 2015 (two days before the *Art & Allposters* ruling of the CJEU) the Dutch Court of Appeals ordered the Tom Kabinet website be shut down, however this was not a 'loss' for digital big bang advocates. Rather, this decision was made because the website also allowed the sale of illegally obtained copies of e-books: The Court did not rule substantively on the exhaustion issue and if Tom Kabinet's system could ensure that only legally downloaded content could be resold then it could have remained open for business.³⁹⁸ For now, it seems, that the resale of downloaded content is a legally acceptable model in the Netherlands, so long as this content has been legally acquired in the first place.

Given the starkness of the contrast between this ruling and that of the Higher Regional Court of Hamm noted above, it seems necessary for the CJEU to intervene and insert some clarity into this issue. Although *Art & Allposters* does indicated exhaustion of intangibles in excluded under the CD (therefore meaning the Dutch Court has incorrectly applied the Directive), this is not yet explicit given that that ruling was outside of the digital context. At the time of writing, it has been reported but not confirmed that this case will be referred to the CJEU for preliminary ruling.³⁹⁹

³⁹⁷ M Olmedo Cuevas (2014), 'Dutch Copyright Succumbs to Aging as Exhaustion Extends to E-Books', *Journal of Intellectual Property Law & Practice*, published online 26.10.2014.

<<http://jiplp.oxfordjournals.org/content/early/2014/11/20/jiplp.jpu200.full.pdf+html>>, accessed 12.12.2014.

³⁹⁸ M Olmedo Cuevas (2015), 'Amsterdam Court of Appeal Gives Tom Kabinet Three Days to Shut Down' (The 1709 Blog blog), posted 21.01.2015. <<http://the1709blog.blogspot.de/2015/01/hot-news-amsterdam-court-of-appeal.html>> accessed 21.01.2015; S Sluiter (2015), 'The Dutch Courts Apply Usedsoft to the Resale of Ebooks' (Kluwer Copyright Blog blog), posted 23.01.2015.

<<http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/>> accessed 30.01.2015.

³⁹⁹ E Rosati (2014), 'Dutch Court Refers Questions to CJEU on E-Lending and Digital Exhaustion, and Another Dutch Reference on Digital Resale May Be Just About to Follow' (The IPKat Blog blog), posted 15.09.2014. <<http://ipkitten.blogspot.de/2014/09/dutch-court-refers-questions-to-cjeu-on.html>> accessed 15.05.2015.

2. *Responses to the European Commission's Copyright Review*

In 2013, with questions about the broader implications of *UsedSoft* undoubtedly proving exhausting, the European Commission, launched a public consultation on the review of the EU copyright rules.⁴⁰⁰ Section 4 of this consultation specifically asked stakeholders about the situation of 'download to own content' (a term that is not defined in the document). The responses are interesting insofar as they highlight the fears of stakeholders about the extension of exhaustion to intangibles, although often these fears are predictable.⁴⁰¹ They also stress the numerous perceptions about how intangibles can be perceived as being 'like' or 'different' to tangibles, which already sets the scene for the discussion about the impacts and challenges of applying exhaustion to e-books in our next section.

a. Responses of the MS

In total, 11 MS responded to the review⁴⁰², and of these 8⁴⁰³ responded to the specific question on download-to-own content or addressed the issue of exhaustion in any way. The most substantively interesting responses came from France, Poland, Ireland, the UK and Slovakia.⁴⁰⁴

The Polish and French governments felt that the current framework of the CD does not allow for e-exhaustion. The French government focused on a legal interpretation stressing that in its view AS 6 of the WCT blocks exhaustion (in contrast to the findings of section I.1 of this Chapter) and underlined that it sees no reason to extend exhaustion

⁴⁰⁰ <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> accessed 12.01.2015.

⁴⁰¹ For an interesting graphic analysis, see L. Dobusch (2014), 'EU Commission's Consultation Report Shows: Current Copyright Is Unbalanced' (Governancexborders blog), posted 25.07.2014. <<http://governancexborders.com/2014/07/25/eu-commissions-consultation-report-shows-current-copyright-is-unbalanced/>> accessed 30.01.2015. Full quotes used to make this infographic can be accessed on the public Google spreadsheet available here: <https://docs.google.com/spreadsheets/d/1rQISdGFzHVnMNJ_IVQIYykd5smFoItjVd7YsnkOfkuk/edit#gid=71542109> accessed 20.01.2015.

⁴⁰² These were: Denmark, Estonia, France, Germany, Ireland, Italy, Latvia, the Netherlands, Poland, Slovakia, and the United Kingdom. EC - Report on the Responses to the Public Consultation on the Review of EU Copyright Rules (2014), 4. Responses can be downloaded at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

⁴⁰³ France, Ireland, Italy (briefly), Latvia (in passing), the Netherlands (in passing), Poland, Slovakia and the UK.

⁴⁰⁴ Italy simply noted that Article 3(3) of the CD (on the non-exhaustion of the right of communication) blocked any possibility of resale, while Latvia did not comment specifically but did note that it 'would welcome a comprehensive analysis and discussions at the EU level in relation to the resale of digital files, especially on the economic implications of the creation of digital resale markets.' The Netherlands, rather surprisingly, did not mention exhaustion but it can be noted that the Dutch government is in favour of a re-adjustment of the copyright framework, expressing the feeling that it 'no longer connects to the current digital and almost limitless environment where technological developments follow each other in rapid succession.'

the digital environment.⁴⁰⁵ The Polish government gave a less legalistic stance, but set out reasons justifying the non-application of exhaustion, which are the same as those forwarded by France.

“There is a lack of ability to control the continued sharing of songs in digital formats [...] In addition, secondary trading of digital copies of works constitutes a threat to the primary market - copies are always of the same quality, but on the secondary market could be resold at a lower price.”

Taking a different stance was the Irish government; there, the feeling seems to be that *UsedSoft* could have cross-content implications (although this is implied from the response rather than stated). This is surprising to the present author, particularly since most informed opinions do seem to doubt the cross-application of *UsedSoft* to the CD, as noted above. The Irish response states that:

“Arising from the CJEU findings, the reselling of previously used digital content originally distributed via download does not infringe the copyright holder's distribution right, provided that the originally downloaded copy is deleted or rendered unusable. Despite the obvious benefit for consumers to have the option of purchasing previously used digital content at a lower cost, it may become increasingly difficult to determine whether they are purchasing a legally valid, previously used digital property from a legitimate source. The sale of previously purchased digital content will also frustrate counter-piracy measures especially.”

From this, it can be discerned that the Irish stance is begrudging of the *UsedSoft* ruling rather than denying it has any implications for non-software content.

Sitting on the fence was the Slovakian government, which although it noted that in the Slovakian copyright Act exhaustion is not format specific, did not dare to give an interpretation or propose the application of this:

“We believe that the establishment of a legal framework to allow the resale has legally acquired digital content can bring their advantages and disadvantages. On the one hand, more sales in a way that digital content (subject matter) will be cheaper, increase the supply and availability. On the other hand, after allowing for resale, may be even greater increase in copyright infringement if you attempt to

⁴⁰⁵ The French government argues that the international framework would have to be changed to allow exhaustion, a view has also been presented by some academic authors: see for example, K Moon, ‘Resale of Digital Content: *Usedsoft v Redigi*’ (2013) 24 (6) Entertainment Law Review.

circumvent the legal framework.”

The UK was the only government to respond favourably to the idea of broader exhaustion following on from the *UsedSoft* ruling. Surprisingly liberal given the scale of the publishing lobby in the UK their response noted that:

“[T]raditional secondary markets for goods can encourage both initial purchase and adoption of technologies, and the prospect of sale on the secondary market may be factored in to an initial decision to buy and to market prices. There seems to be no reason why this should not be the case for digital copies, except for the “forward and delete” issue noted by the consultation. Because of this issue, a sophisticated analysis of the overall economic implications of digital resale markets is required, and this would be an area suitable for further research⁴⁰⁶.”

b. Responses of publishers

Publishers’ opinions were represented in the following quotation from the response of the Creativity Works! Coalition; the reiteration of the protection offered by the current Copyright Directive shows a reluctance for change and it can be noted that the response closely resembles the stance of the French government above. They fearfully provide that:

“A regime of “digital exhaustion” based on a concept of “forward and delete” is unworkable in practice as it is not possible to verify and/or manage transfers of digital content. And in the absence of any physical wear and tear of the resold item, exhaustion would harm the business model of the copyright owner and would be incompatible with international norms to which the EU and Member States are bound.

Digital files do not deteriorate over time like physical copies do. One purchased digital copy could potentially be resold millions of times on the secondary market, which would – as a direct effect – destroy the primary market.”

c. Responses of libraries

Libraries have been particularly outspoken about this issue, since lending rights are dependent on exhaustion⁴⁰⁷. EBLIDA, the umbrella association for library and

⁴⁰⁶ UK Government (2014), ‘UK Response to European Commission Consultation December 2013: Review of the EU Copyright Rules’, London, February 2014, p. 3. <<http://www.ipso.gov.uk/response-eucopyrightrules.pdf>>, accessed 20/03/2013.

⁴⁰⁷ Müller, ‘Legal Aspects of E-Books and Interlibrary Loan’ (2012).

information association, has launched a ‘Right to E-Read’ campaign⁴⁰⁸ with the central aim of bringing e-lending within the European legal framework rather than remaining dependent on individually negotiated contracts with publishers and/or authors. The situation of e-books lending is a case in point, with rumours abound that the Netherlands Public Library Association (VOB) has started a test case against *Stichting Leenrecht* (the Dutch public lending right collecting agency), in which it has asked the Regional Court of the Hague to refer questions to the CJEU on whether libraries have a legal right to e-lending based on an ‘electronic interpretation’ of the Rental and Lending Right Directive 2006⁴⁰⁹, as justified by the *UsedSoft* decision⁴¹⁰. This case would be of particular interest since the same doubts as to the legislative intent behind e-exhaustion arise in the rental context as in the CD, as expressed below. The response of EBLIDA is perhaps not as strong as one may have expected, likely because Section 4 concentrates on *resale*, but does indicate that the logic if not the expression is similar to that argued in this chapter. EBLIDA’s response states that: ‘Cultural content in any form of distribution should be treated by the law for what they are - content and not temporary services.’⁴¹¹

d. Responses of users

From the Commission’s report, it seems that (5622 responses in total, 58.7%) users were favourable to opening up the exhaustion principle to enable also a secondary market for digital content. Without qualification, the report summarises that ‘End users/consumers state that printed books and eBooks should be treated in the same way.’

Rebutting the concerns of authors, “Some consumers maintain that the argument that digital files do not deteriorate put forward by rightholders is incorrect, since the value of digital files is reduced with time as new versions and editions become available - with higher resolutions, new features, updates, etc. Consequently, they argue that the secondary market for digital files would have little harmful effect on the primary market.”

e. The Commission’s own position

The Commission’s own position is not evident from the Review, however it seems that assurances have been given to the publishing industry at least that *UsedSoft* does not

⁴⁰⁸ <<http://www.eblida.org/e-read/home-campaign/>> accessed 12.01.2015.

⁴⁰⁹ Directive 2006/115/EC of the European Parliament and of the Council of 12th December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376 p.28 of 27.12.2006.

⁴¹⁰ The reference is not yet listed on the Curia website, however the case has been confirmed by the Nederlands Uitgeversverbond (Dutch Publishers Association). See also the EBLIDA Newsletter, October 2013 p.3, available at <[http://www.eblida.org/Newsletter%20folder%20\(upload%20files\)/Newsletters-2013/2013_10_October.pdf](http://www.eblida.org/Newsletter%20folder%20(upload%20files)/Newsletters-2013/2013_10_October.pdf)> accessed 12.01.2015.

⁴¹¹ EBLIDA - Response to Copyright Consultation (2014).

mean e-exhaustion is on the way.⁴¹² The Commission's position on the CD is evident from its submissions in the *UsedSoft* case:

“‘[M]aking available to the public’ within the meaning of Article 3(1) of Directive 2001/29 [...] in accordance with Article 3(3) of that directive, cannot give rise to exhaustion of the right of distribution of the copy”.⁴¹³

However, in the review the Commission takes a more open stance, referring to the *lex specialis* nature of the CPD only in a footnote referencing the *UsedSoft* ruling. More telling are the words of Maria Martin-Prat, Head of the Copyright Unit for DG MARKT, which demonstrate the Commission's unease at the ruling and the possibility of opening up the CD to allow digital resale:

“UsedSoft was desperately trying to turn software licensed by a user into a good - so they could enjoy free movement of goods,” she observed. “The Court cut a few corners” in its interpretation, she thought. However, “if we don't do something at some point the CJEU will keep pushing.”⁴¹⁴

This is also reflected in a leaked draft of the Commission White Paper⁴¹⁵ – an official version of which is yet to emerge. In the draft, the Commission is hesitant of allowing exhaustion of intangibles, providing that ‘policy initiatives on the exhaustion principle would seem premature at this stage’⁴¹⁶

It should be noted that this draft was the work of the previous Commission, and that the shape of any future version is likely to be both delayed and altered by the move of the Copyright Unit from its longstanding place in DG Markt to DG Connect. This move is likely to see a shift in focus from traditional protection to more emphasis on opening up of digital markets, a shift which might be reflected in the forthcoming document.

⁴¹² Information from the FEP, June 2013.

⁴¹³ Case C-128/11 *Usedsoft*.

⁴¹⁴ Tim Cushing (2014), ‘EU Copyright Head Looking to Roll Back Usedsoft Decision, Makes Weak Noises About ‘Infinite Contracts’ (TechDirt blog), posted 02.07.2014. <<https://www.techdirt.com/articles/20140627/11143027703/eu-copyright-head-looking-to-roll-back-usedsoft-decision-makes-weak-noises-about-infinite-contracts.shtml>> accessed 12.12.2014. date of speech?

⁴¹⁵ European Commission (2014), ‘Internal Draft White Paper: A Copyright Policy for Creativity and Innovation in the European Union’, Brussels, undated, leaked 23.06.2014. <[https://www.dropbox.com/s/oxcflgravoitqlb/White%20Paper%20\(internal%20draft\)%20\(1\).PDF](https://www.dropbox.com/s/oxcflgravoitqlb/White%20Paper%20(internal%20draft)%20(1).PDF)>, accessed 12.12.2014. For an overview see E Rosati (2014), ‘Super Kat-Exclusive: Here's Commission's Draft White Paper on EU Copyright’ (The IP Kat blog), posted 23.06.2014. <<http://ipkitten.blogspot.it/2014/06/super-kat-exclusive-heres-commissions.html>> accessed 12.12.2014.

⁴¹⁶ EC - Internal Draft White Paper: A Copyright Policy for Creativity and Innovation (2014), 7.

IV. ACHIEVING OUTCOME EQUALITY: IMPACTS AND TECHNICAL CHALLENGES

This section looks at the way that intangible environment functions and the impacts this has on the working of exhaustion. It highlights the core difficulties noted in the previous section that will have to be overcome if the doctrine is to be applied to e-books in order to achieve the aim of outcome equality. This section looks in particular at: (1) Defining an ‘exhaustible’ transaction; (2) the ‘reproduction copy’ problem; (3) effects of exhaustion on the market and author remuneration; and (4) whether the ease of migrating between business models create any difficulties.

I. *Defining an ‘exhaustible’ transaction*

Part of the exhaustion conundrum is in defining what exactly can be ‘sold’ to be classified as a distribution therefore leading to exhaustion. However, this is a classificatory problem rather than a legal blockage: If it is decided that intangibles can be ‘sold’ then they can be distributed and consequently the distribution right can be exhausted. This is essentially what the CJEU did in *UsedSoft* under the CPD, but seems to have refrained from doing – at least from the *Art & Allposters* ruling – in the context of the CD.

By way of example, it is interesting to look at the 2011 European Commission proposal for a Regulation on a Common European Sales Law which is set around – as the name suggests – sales.⁴¹⁷ This instrument is not short of sceptics, however the proposed definitions are interesting for our purposes.⁴¹⁸ ‘Sales contracts’ are defined as

“any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the *goods* to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof.”⁴¹⁹

Goods are ‘any tangible movable items’.⁴²⁰ As such, by including the word ‘goods’ the definition of a sale means that intangible transfers must be something other than sales. This is not the position the CJEU reached with regards exhaustion under the CPD in *UsedSoft*, where it found that a ‘sale’ for ‘first sale’ can relate to a tangible or an intangible

⁴¹⁷ European Commission (2011), ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’, COM(2011) 635 final, Brussels, 11.10.2011.

⁴¹⁸ Micklitz and Reich, ‘The Commission Proposal for a “Regulation on a Common European Sales Law” - Too Broad or Not Broad Enough?’ (2012).

⁴¹⁹ CESL Proposal, Article 2(k).

⁴²⁰ CESL Proposal, Art 2(h). This article excludes the expansions made by the court to include electricity and natural gas, and water and other types of gas unless put up for sale in a limited volume or set quantity.

copy of a computer program.⁴²¹

Despite intangible content transfers being outwith the scope of a ‘sale’ for the purposes of the CESL, the proposal extends its coverage to ‘contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored’. Thus, the inclusion of digital content within the CESL is perhaps deceiving; the instrument is not intended to mean that intangibles can be treated as sales, but rather that they are a supplementary category of ‘quasi-sale’ also worthy of Europeanisation efforts. However, this is not to say that all access models should be treated as ‘sales’ or distributions: Whether content is streamed or downloaded, and whether this is for limited or unlimited durations will necessarily have an impact on the categorisation. It would be wrong in this context to consider all models as uniform: While some conditions may be ‘sale-like’ enough to bring in the distribution right that can then be exhausted, others may not.

For example, in *UsedSoft* the Court places importance on the fact that the features of the licence must be functionally equivalent to a sale. From that judgment, there is an indication that permanency is required; that the right to access is for an unlimited period. However, this may be a simple reference to the features of the contract at hand. In this sense, durability rather than permanency is more adequate, although deciding whether a licence to use for a year, 2 years, 10 years or 20 years is durable enough to be subject to exhaustion then becomes a key question. This will likely depend on the facts of the case and it is not likely that introducing a particular time limit would help the situation as this enables too easy circumvention⁴²²: if we say contracts for 15+ years are subject to exhaustion, the easy get around is to limit the duration to 14 years. Here, it is pertinent to bear in mind the lifespan of technology, and the likelihood that over time some degree of format migration is likely to be required (as from the floppy disk to the CD).

Another specification in the *UsedSoft* ruling – and in keeping with the remuneration theory of exhaustion – is that for exhaustion to apply there must be remuneration ‘corresponding to the economic value of the copy of the work’. It is impossible to put a finger on the exact amount that would ensure this criterion is met, however it would seem relevant where e-books are facsimile editions of print books to use the print price as a reference, then take into account a reduction based on the reduced marginal costs. The clear problem with reading too much into this specification of the Court is that it is not – and never has been – the place of the Court to decide what remuneration authors should receive, or to judge on when this is adequate. At most what we can learn from

⁴²¹ Case C-128/11 *Usedsoft*.

⁴²² Torremans, ‘The Future Implications of the *Usedsoft* Decision’ (2014).

this is that a price point in the region of the print edition that meets consumer price expectations for a physical copy would be indicative of a ‘sale-like’ transaction.⁴²³

Lastly, there is a further difference between books and e-books is inherent in their very nature, although a close examination of this subject is outside the scope of the current research project. This is the link between their choice of hardware and their choice of e-book, which will in many cases be restricted by format and/or DRM. This raises questions about the resale of e-books and leads us to ask to what extent it would be possible to break DRM or formatting restrictions in order to enable resale? While it is clear that under Article 6 CD (implementing Article 11 WCT) MS are under an obligation to prevent circumvention of TPMs, legal protection against infringements of copyright are subject to the principle of proportionality:

“Accordingly, that legal protection is granted only with regard to technological measures which pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder of copyright.”⁴²⁴

Placing this into our current context, this tells us that if the Court – or the legislator – was to specify that e-exhaustion can take legitimately take place even without the rightholder’s authorisation, circumvention would likely be permitted so far as is necessary to permit that resale.

The related difference relating to formatting is difficult to assess: it means that where e-books continue to be sold in a format specific to a particular device, they will only be readable on that device even on the ‘second hand’ market, meaning that more niche resale markets would be present than in the physical book context. This problem has been reduced to an extent by the development of e-reader applications that can be loaded onto tablet devices to allow, for example, Kindle e-books to be read on an iPad through the Kindle App, but this does not fully resolve the problem; the e-books are still confined to the Kindle ecosystem and should the reader wish not to use the Kindle App, then his or her purchases still represent a loss despite the fact that they have resale value. The application of the exhaustion doctrine to such downloads would enable this value to be realised, so long as the approach to DRM is taken as has been indicated in the *Nintendo* ruling.

⁴²³ It can be recalled however that the German Regional Court of Bielefeld did not think consumers could be ‘duped’ into believing they had the same rights as if they owned a physical copy.

⁴²⁴ Case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc. And Nintendo of Europe GmbH v Pc Box Srl and gnet Srl* [2014] ECLI:EU:C:2014:25, judgment of 23.01.2014, [31].

2. *Getting around the reproduction copy*

The ‘reproduction copy’ problem is the most difficult on both a practical and a conceptual level. The distribution right was envisaged at a time when only sales of physical items were possible, and those sales entailed alienation of the item from the original owner. This alienation does not take place in the intangible context, although an artificially forced alienation is now possible through ‘forward and delete’ technological advances. Grimmelman has aptly described the problem: copyright laws, drafted with the offline trade in mind, provide for two scenarios. The first is where a book – the same book – is *transported* from A to B, and the second is where a book is *replicated*. Exhaustion should only apply to the first of these scenarios, because in the second an *additional* copy is produced that the rightholder did not intend, and for which due remuneration has not been paid. When we come to talk about digital exhaustion,

“a download is a bizarre hybrid of the two. There’s an *old* copy *here* on my computer, and once I send you the bits, there’s also a *new* copy *there* on your computer. The Internet therefore is something of a ‘transporticator’ that creates a perfect replica of Kirk down on the planet, while also leaving the original Kirk free to roam the Enterprise.”⁴²⁵

For many, the core difficulty in applying the *UsedSoft* reasoning to the CD is that the reproduction ‘get-around’ in the CPD is not replicated in the CD. However, as has been expressed previously in this thesis, it is the view of the present author this case should be read in a teleological rather than literal frame. The Court finds a way to ensure the balance is unchanged in the digital environment by providing that a ‘forward and delete’ approach must be followed; this means that the ‘transporticator’ is transformed into a ‘transporter’ because what it sees as important is that no *additional* copy comes into being. In other words:

“The answer to the machine may be the machine... If digital technology dissolves what used to be a copy for exhaustion purposes why not try to fix the problem by using technology to create a functional equivalent to conventional copies.”⁴²⁶

Such a pragmatic approach is in keeping with other cases where the reproduction right has been at issue. Targosz notes that:

⁴²⁵ J Grimmelman (2014), ‘Redigi, Digital First Sale...And Star Trek’ (Publishers Weekly blog), posted 02.04.2014. <<http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/56646-grimmelman-redigi-digital-first-sale-and-star-trek.html>> accessed 12.12.2014.

⁴²⁶ Wiebe, ‘The Economic Perspective: Exhaustion in the Digital Age’ (2010), p. 326.

“[The CJEU] shapes the concept of exhaustion in an autonomous way, as a tool to ensure *effective* circulation of goods and when needed, acknowledges exhaustion of other rights than the purely ‘material’ right of distribution.”⁴²⁷

In this light, *Art & Allposters* might have to be read as a break from this approach, although since the case did not deal specifically with the digital context we will have to wait for future rulings – likely to stem from the ongoing *Tom Kabinet* case – to say for sure. Indeed, Targosz’ interpretation fits with previous rulings dealing with the reproduction right, particularly relating to exhaustion in the context of trademarks; for example, in the *Dior* case⁴²⁸ the Court ruled that rightholders are precluded from enforcing their reproduction right where the object of applying that right is to block further distribution where the distribution right itself has already been exhausted.⁴²⁹ In this decision, the major concern of the Court is not to undermine the purpose of the ‘exhaustion of rights rule’⁴³⁰; the language used is very similar to that used by the Court in *UsedSoft*: disallowing exhaustion of downloads would ‘divest [the rule of exhaustion] of all scope’⁴³¹.

Importantly, outcome equality envisages exhaustion in the intangible context only to the extent that it replicates the physical exchange of copies; it is intended that once the reproduction copy comes into being the original will cease to be useable. If a pragmatic approach as seems to be favoured by the Court is used, so long as no *additional* copy is brought into circulation the resale could take place. Rather than looking at things from the perspective of duplication and multiplication, in the interests of achieving equality it makes more sense to concentrate on the *end result* of the transaction: If there are no more copies in circulation than there were prior to the resale, this does not interfere with the author’s rights and so blocking it would not be proportionate. Viewing the reproduction right as limiting only *additional* copies is assisted by the provisions of the CPD but not the CD, which allow for additional copies to be made where necessary for use. This is a permitted limitation at the international level also, so long as it meets the

⁴²⁷ Targosz, ‘Exhaustion in Digital Products and the “Accidental” Impact on the Balance of Interests in Copyright Law’ (2010), p. 342.

⁴²⁸ concerned parallel imports of luxury perfumes, which Dior attempted to block by asserting copyright in the packaging featured in the advertisements of discount resellers and claiming a violation of its right of reproduction (recognising that its distribution right had been exhausted, but arguing that its reproduction right could not be) C-337/95 *Parfums Christian Dior SA v Evora BV* [1997] ECR I-6013. See Targosz, ‘Exhaustion in Digital Products and the “Accidental” Impact on the Balance of Interests in Copyright Law’ (2010).

⁴²⁹ TM Cook, *EU Intellectual Property Law* (Oxford: Oxford University Press 2010), p. 27. Cook also references similar reasoning in a case of the EFTA Advisory Board (Case E-1/98 Norway v Astra Norge AS (EFTA Advisory Court, 24.11.1998).

⁴³⁰ C-337/95 *Dior*, [37].

⁴³¹ Case C-128/11 *Usedsoft*, [49].

requirements of the three-step test;⁴³² it is as such possible for such a reading could be applied to the CD – or its eventual replacement – in due time in order to preserve the objectives of exhaustion in the digital environment.

However, ensuring that no additional copy comes into being requires a strong dependence on technology, something that rightholders continue to be sceptical of. Ultimately, it is likely to be for national courts to decide whether the technology within the resale system actually ensures exhaustion is indeed the functional equivalent to passing on a physical copy. For this, an element of trust must be placed in the system used by the willing reseller to ensure no further copies enter into circulation. With UsedSoft, ReDigi and now Tom Kabinet, we have examples of systems that pertain to achieve this. Dependence on such technologies could be a double-edged sword; technology giants such as Apple and Amazon have filed patents of this nature, which raises new questions of reliance and selectivity on the secondary market.

3. *A perfectly competitive marketplace*

Opening up the secondary market brings the same benefits of competition leading to innovation, but also brings elevated challenges as compared to the print market because there is no (or very little) degradation between the sales. Authorizing e-exhaustion is also authorizing the creation of a market identical to that which provides authors with their revenue stream. On the second-hand market price points can be chosen at will⁴³³, in all likelihood below the first sale price; the question is then whether consumers would choose the first market still and if not, what happens to author remuneration given that this only occurs on the first sale. The domino effect feared by publishers and authors is that this will lower price expectations and draw consumers away from the first market: ‘Such a marketplace could be economically de-stabilising to the publishing industry.’⁴³⁴

However, this feared impact does not flow necessarily from the application of the exhaustion doctrine, which rather sets out to rectify the current situation where publishers have a monopoly over access to consumers. In the first place, using the ‘forward and delete’ logic, the number of copies available on the second market would be limited to the number of consumers able and willing to resell their copy, giving up their own access. In the second place, what is referred to as a negative by the industry is not

⁴³² Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24th July 1971, as Amended on 28th September, 1979 (‘Berne Convention’) 1161 U.N.T.S. 30, Article 9. <http://www.wipo.int/treaties/en/text.jsp?file_id=283698>, accessed 10.03.2014.

⁴³³ This is particularly relevant where fixed e-book pricing is in place, since the fixed price should not apply in resale situations.

⁴³⁴ E Gallacher and S Jauss (2014), ‘Exhaustion of Copyright’ (Lexology blog), posted 31.01.2014. <<http://www.lexology.com/library/detail.aspx?g=29fod605-aae8-4163-966b-3d2acboba3a3>> accessed 12.12.2014.

wholly to be seen as a bad thing: A perfectly competitive second market could lead to the increase in innovation desired in the first place; as highlighted by user responses in the Commission's summary of the Copyright Review consultation, innovation in the e-book context has increased potential through the addition of new multimedia features.⁴³⁵ However, it could also have the consequence of driving first sale prices down, affecting the remuneration of authors, but this effect remains residual because with a forward and delete style rule the number of copies on the market will always remain limited. For additional reasons also – convenience, transactional trust issues – many consumers may not choose to purchase content through the second channel at all, thus leaving the first sale avenue intact.⁴³⁶

4. *Migrating business models*

Finally, connected to the above definitional issue there is a point to be made about the ease of migrating business models to circumvent e-exhaustion. By providing for only limited-time licences or dropping the price significantly so that it does not constitute 'remuneration for the author' it is possible for retailers and publishers to avoid the exhaustion rule applying to e-book content at all.

“It is therefore questionable whether copyright law should encourage business models, the aim of which is exactly the opposite. However vague this observation may seem, it may be argued that the proper balance of interests (of right holders and of the public) in copyright requires that at some point the work has to be ‘disconnected’ from the right holder, so that its normal use did not demand recurring authorisations. The concept of exhaustion helps to achieve this aim, whereas limiting exhaustion makes it harder.”⁴³⁷

The line taken in this thesis is that intangible exhaustion should only be applied where there is equivalence between the print and intangible situation. However if it is too easy to get around this equivalence exhaustion could become irrelevant not because of the legal system but the business one. Exhaustion has broad objectives and where the conditions for exhaustion can be circumvented these cannot be fulfilled in the digital environment.

There is nothing that regulation can do to oblige rightholders to offer their content in a

⁴³⁵ EC - Report on the Responses to the Public Consultation on the Review of EU Copyright Rules (2014).

⁴³⁶ A point to be made here is that where established players on the retail market also become active on the secondary market these trust and convenience issues evaporate. For example, in the US both Apple and Amazon have filed for patents over forward and delete style technologies, indicating they are willing to enter onto the secondary market.

⁴³⁷ Targosz, 'Exhaustion in Digital Products and the "Accidental" Impact on the Balance of Interests in Copyright Law' (2010), p. 348.

‘sale-like’ manner to ensure exhaustion takes place, however in the view of the present author work could be done to alleviate the worries of rightholders that centre on the suitability of forward and delete methods by providing clear guidance. Patenting of such technologies will in the long run provide trust in their systems, however regulators must also be aware of the conditions upon which these systems are being made available to ensure the broadest possible uptake.

V. CONCLUSIONS

This Chapter has examined the question of digital exhaustion under the analytical framework of outcome equality. From Section I, it became plain that the legal framework of the CD has been put in place specifically to block the possibility of intangible exhaustion. Although the CD is almost 15 years old at the time of writing, the industry-led fears about the consequences of intangible exhaustion that drove this blockage in the first place still seem to resonate today. This is despite the fact that when we look at the objectives of exhaustion, both general and internal market specific, these objectives seem to be just as relevant and desirable in the intangible environment; by applying our rule-objective standard for equal treatment we come to the opposite conclusion from many stakeholders, that equality can and should drive the regulation in this context without impeding the functioning of the market.

However, our framework has also flagged that outcome equality can only be achieved if certain impacts of e-books are dealt with within the regulation; in particular, decisions must be made about what makes a transaction ‘exhaustible’ with respect to ‘sales-like’ features and it must be assured with certainty that ‘forward and delete’ or other safeguards are in place to ensure an *additional* copy does not come into circulation.

As we move forward, more clarity with respect to the doctrine in the digital context specifically – something that *Art & Allposters* did not give us – is already looking likely to come from the direction of the Netherlands, with a preliminary reference pending regards lending and digital exhaustion⁴³⁸ and suggestions of a further reference to the CJEU in the *Tom Kabinet* case.⁴³⁹

However, given the legal blockages of the CD in its current form, the CJEU seems unlikely to sway from the legislative intent under the CD not to allow intangible

⁴³⁸ Case C-174/15 *Vereniging Openbare Bibliotheken* [Pending] Application lodged 17.04.2015, question referred by the Rechtbank Den Haag - Netherlands.

⁴³⁹ Rosati (The IPKat Blog 2014).

exhaustion. This means that change should rather come from the EU legislator through amendments to the CD.

If driven by the rationality of our equality framework rather than the arbitrariness of lobbying efforts, there would be good reason to extend the doctrine of exhaustion to intangibles because the objectives can translate. In addition, another line of equality reasoning could be drawn: the current misalignment between the CD (no intangible exhaustion) and the CPD (allowing intangible exhaustion) as a result of the latest string of CJEU rulings represents a clear contradiction between two instruments both supposedly implementing the WCT.

Although our analysis has flagged a need to extend exhaustion to intangibles for reasons of equality, the Commission – despite its recent consultation – seems to be backing off from proposing any legislative reforms. With the leaked Commission White Paper on ‘A Copyright Policy for Creativity and Innovation in the European Union’, hopes of consumers, consumer groups and academics dwindled as the Commission judged it premature to take a stand on digital exhaustion⁴⁴⁰ and in the recently released Digital Market Strategy (May 2015), exhaustion was not mentioned. Nor was exhaustion mentioned in the EP Report on the Implementation of the Infosoc Directive, drafted by Rapporteur Julia Reda (PirateParty).⁴⁴¹ Unfortunately for now at least, the exhaustion issue appears to be rather exhausted.

⁴⁴⁰ EC - Internal Draft White Paper: A Copyright Policy for Creativity and Innovation (2014).

⁴⁴¹ European Parliament (2015), ‘Draft Report on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, Juri, JURI_PR(2015)546580PE 546.580v02-, Brussels, 15.01.2015. <<http://www.europarl.europa.eu/committees/en/juri/draft-reports.html?ufolderComCode=JURI&ufolderLegId=8&ufolderId=02354&linkedDocument=true&urefProcYear=&urefProcNum=&urefProcCode=>>, accessed 15.05.2015. At the time of writing, the Report is pending a vote in the Plenary.

CHAPTER 6: REDUCED RATES OF VALUE ADDED TAXATION FOR E-BOOKS

INTRODUCTION

Value Added Tax (VAT) is a general tax on consumption and is a core government revenue source for all the EU MS, making up around 7.5% of GDP.⁴⁴² VAT is – as the name suggests – a tax on value added; it is a consumption tax where the tax on purchases can be deducted from that on sales. Output VAT is paid by consumers⁴⁴³ of goods or services and is charged by a VAT registered business supplying those products or services. That business will have paid input tax on any goods or services used in the production process. A business is liable to the tax authority for the difference between the amount paid on output tax and input tax.

In the EU, VAT has been the subject of harmonisation since 1967. In 1992 a dual rate system was introduced into the VAT Directive Article 98, allowing for MS to apply standard rates above the minimum provided therein or one or two reduced rates to a select group of goods and services listed in Annex III.⁴⁴⁴ It is important to be clear that it is for the individual MS to decide whether or not they take advantage of the possibility offered under Annex III to apply a reduced rate; at present 26 of 28 MS do avail themselves of this opportunity for books, with only Bulgaria and Denmark choosing not to apply reduced rates.⁴⁴⁵ This is significant for the scope of the current work, to the extent that it is only the *option* to provide a reduced rate for e-books that is decided at the EU level. The solution proposed by this thesis means that equal treatment demands that e-books be given the same *option* under the VAT Directive as print books to be subject to the reduced rate. The principle of equal treatment here acts as guide for both the European framework (in the sense that this framework must be opened to allow MS to make this choice) and the Member State VAT policy (in the sense that it is for the MS to decide whether equal treatment – or fiscal neutrality in this specific context – requires equalisation in this respect⁴⁴⁶).

⁴⁴² European Commission, 'VAT Gap: Frequently Asked Questions', (Press Release), Brussels, 19.09.2013.<http://europa.eu/rapid/press-release_MEMO-13-800_en.htm>.

⁴⁴³ Note that 'consumers' here does not necessarily refer to end consumers; the good or service can be 'consumed' anywhere in the supply chain, and can be used as an input.

⁴⁴⁴ Consolidated VAT Directive (v.2013).

⁴⁴⁵ Currently 26 of 28 MS do apply reduced rates to VAT (Bulgaria and Denmark do not).

⁴⁴⁶ Opinion of Advocate General Mengozzi in Case C-213/13 *K Oy*; Case C-219/13 *K Oy*.

Reduced rates of VAT have been a prickly subject from an EU law perspective since their introduction in 1992⁴⁴⁷ and the dual rate system finds itself somewhere between antipathy and acquiescence in the greater EU harmonisation project. Antipathy because the wide discrepancies in rates between States that the dual rate system condones stand in the way of coherence within the Union; acquiescence because the very reason reduced rates were introduced in the first place was to avoid ‘upset[ting] the majority of Member States’.⁴⁴⁸ This latter concern is of particular importance for books because of their twofold cultural and economic nature and the interaction between EU law and national cultural policy as a consequence, as was discussed in Chapter 4.

There are also specific problems with the VAT Directive itself from an e-book standpoint that form the basis for this Chapter. In 2009, the original reference to ‘books’ in Annex III was amended – with the aim of ‘clarify[ing] and updat[ing]’ the VAT Directive ‘to technical progress’⁴⁴⁹ – to provide that book content ‘on all physical means of support’ can be subject to reduced VAT. Not being contained on a physical support, it is difficult to read e-books or intangible audiobooks into this definition. Further, a separate Article – Article 98 – provides that Electronically Supplied Services (ESS) cannot be subject to reduced rates. Although e-books are not noted in the indicative list of ESS in Annex II, they do fall within this categorisation because of a later Implementing Regulation which introduced a supplementary list including ‘the digitised content of books and other electronic publications’.⁴⁵⁰ The result of these two features of the Directive is that while MS are free to apply reduced VAT to physically embodied book content – be this printed books, audio books on CDs or even e-books on CDs – they are blocked by the VAT Directive from applying the same treatment to intangible e-books. This interpretation of the VAT provisions has been reinforced by the findings of the CJEU on 5th March 2015 in two separate cases – one against France⁴⁵¹ and one against Luxembourg⁴⁵² – for their respective equalisations of print and e-book VAT rates.

⁴⁴⁷ Council Directive 92/77/EEC of 19 October 1992 Supplementing the Common System of Value Added Tax and Amending Directive 77/388/EEC (Approximation of VAT Rates) (‘Directive 92/77/EEC’) OJ L 316/1.

⁴⁴⁸ See p. 85 for more context: European Commission (1987), ‘Proposal for a Council Directive Supplementing the Common System of Value Added Tax and Amending Directive 77/388/EEC— Approximation of VAT Rates,’ COM (1987) 321 Final/2, Brussels, 1. At the time, all but two Member States –Denmark and the UK – had both standard and reduced rates. The UK did however provide for a zero rate band, which it continues to apply to books.

⁴⁴⁹ It can be noted that this is down to a general dislike of reduced rates rather than a sentiment to the effect that books in particular should not be subject to them.

⁴⁵⁰ This IR also verifies that ESS include ‘services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.’ E-books would clearly fall within this definition. Implementing Regulation of the Council No 282/2011 of 15 March 2011 Laying Down Implementing Measures for Directive 2006/112/EC on the Common System of Value Added Tax (‘Implementing Regulation 282/2011’) OJ L77/1 of 23.03.2011.

⁴⁵¹ Case C-479/13 *Commission v France (E-Books Reduced Rates)*.

⁴⁵² Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*.

The legal frameworks and the findings of the CJEU in these cases are examined in Section I.

Section II then looks at the objective of reduced VAT rates and argues that this is not format-specific; a reduction in VAT paid on e-books would have the same effects and as such there is a basis under our equal treatment analysis to apply the principle. Section III moves on to look at the surprisingly coherent stances between several national governments, the Commission, the EP and market players – not only publishers, but also other digital market players throughout the supply chain. On the e-book VAT issue, the vast majority of voices seem to indicate – in alignment with our rule-objective approach – that equalisation of VAT rates should be the way forward. Finally, Section IV draws on these stances and highlights the impacts of intangible technology that may need to be taken into account so that the rules achieve the same outcome for physical and intangible content.

Before proceeding further, it is useful to highlight again the difference noted in Chapter 3 between fiscal neutrality and the rule-objective based equal treatment used in this thesis. As noted in Chapter 3, fiscal neutrality as envisioned by the CJEU has since 2011 used comparable consumer use as the standard for judging likeness and difference.⁴⁵³ Although the CJEU makes clear in rulings against France and Luxembourg that neutrality cannot be used as an argument to expand a category of goods or services contained in Annex III of the VAT Directive⁴⁵⁴, the *K Oy* ruling, albeit in the context of audiobooks, provides an interesting elaboration of how we are to decide whether two products within a category must be treated alike: It tells us that it is the perspective of the consumer in the Member State under scrutiny which is relevant for a fiscal neutrality analysis. While books are widely used by consumers in their everyday lives throughout the MS, the degree to which e-books are used is very much dependent on the availability of hardware and titles for the software that hardware uses in the MS. Where market penetration is high, it is more likely that e-books and print books will be interchangeable for consumers. Where there are few e-books on offer, quite clearly this will not be the case and there would be no infringement of the principle of fiscal neutrality under this framing.

⁴⁵³ Joined Cases C-259/10 and C-260/10 *Rank Group*; de la Feria, ‘VAT: A New Dawn for the Principle of Fiscal Neutrality?’ (2011).

⁴⁵⁴ See Chapter 3.III above and Section 1.3 of this chapter, below. See also E Linklater ‘The End of the Story for VAT Rates for E-Books?: Case note on Case C-479/13 *Commission v France* [2015] ECLI:EU:C:2015:141, judgment of 05.03.2015 and Case C-502/13 *Commission v Luxembourg* [2015] ECLI:EU:C:2015:143, judgment of 05.03.2015’, Common Market Law Review (2015; pending publication).

The application of the comparable consumer use standard framed might as such bring a different result to the outcome-based approach we are focusing on in this thesis. As has been noted in Chapter 3, the present author sees various flaws with the focus of the CJEU in VAT cases on the consumer, which can lead to technology-dependent rulings that are too on the taste preferences and technology-awareness of a particular country at a given time. Again, it is worth highlighting that a uniform outcome-based framework is preferable because this takes into account the intricate balance between EU law and national policy in this field. While it is acknowledged that a u-turn by the CJEU regards the standard for fiscal neutrality is not likely, this thesis nonetheless takes the viewpoint that a longer-term perspective is more appropriate and that using a rule-objective approach could be a suitable alternative to such a format-based evaluation.

I. THE LEGAL FRAMEWORK

Originally, there was nothing in the VAT Directive itself to substantiate the conclusion that ‘books’ covered traditional print publications only: Article 98 provided only that Member States must provide for goods and services to be subject to either a standard or a reduced rate, and limited their application of the reduced rate to the goods and services listed in Annex III. Annex III point 6 allowed, at that time, for reduced rates to be applied to the ‘Supply [...] of books’. Had this fairly expansive wording prevailed the we might not now have such difficulty reading e-books into this. However, over the years two amendments to the Directive have introduced a duo of firm blockages to reduced rates being applied to e-books downloaded from the Internet and supplied as intangible content files.⁴⁵⁵

The first sticking point emerges from a 2002 amendment to Article 98, which added the second paragraph to point (2) excluding electronically supplied services (ESS) from being subject to reduced rates. Under Article 24(1) of the Directive, the ‘supply of services’ is any transaction not pertaining to goods, and Article 14(1) designates ‘goods’ as relating only to tangible property that can be ‘owned’. E-books are clearly not tangible, even if they do need a physical support to be read, and as such this leaves transactions concerning them to fall within the realm of ‘services’. Although e-books are not contained within the non-exhaustive list of examples of ESS that is to be found in Annex II of the Directive, ‘the digitised content of books and other electronic publications’ do appear in a supplementary list added by a 2011 Implementing Regulation.⁴⁵⁶

⁴⁵⁵ This note principally refers to e-books, as electronic text files were at issue in the cases. However, the blockages in the Directive would also stop Member States from applying reduced rates to intangible audio books.

⁴⁵⁶ This IR also verifies that ESS include ‘services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human

The second blockage comes from Annex III itself, the wording of which was altered in 2009. Point 6 of this list deals with books and the 2009 re-wording specifies that it now covers the ‘supply, including on loan by libraries, of books *on all physical means of support* [...]’.⁴⁵⁷ E-books clearly have no physical embodiment, and so reading them into this definition is difficult.

Both these considerations were examined by the CJEU in its rulings against France and Luxembourg of 5th March 2015 for their unilateral equalisations of print and e-book rates.⁴⁵⁸ In July 2012, the Commission had sent formal notices to both countries based on complaints from ‘local actors in the e-book market’ that the unilateral extension of reduced rates to e-books by these countries was ‘creating serious distortions of competition’. This was alleged because at that point in time VAT was charged at the rate of the country of establishment of the *supplier* (‘place of supply’, POS), although as is discussed below this is no longer the case. As a consequence of the POS taxation, ‘some of the dominant players [in the e-book market had] re-organised their distribution channels to benefit from these reduced rates’; a UK based customer for example could reduce his or her VAT by a rather significant 17% simply by clicking between Amazon.co.uk (Luxembourg based, 3% VAT on e-books) and Waterstones.co.uk (UK based, 20% VAT on e-books). The unilateral reductions in VAT by 2 countries out of 28 meant that consumers could be swayed towards purchases based in those countries because a lower overall price for books could be offered by suppliers there. In the Commission’s view, the provisions of the VAT Directive very clearly blocked States from applying reduced rates to intangible e-books, meaning that ‘law abiding’ States were disadvantaged because consumers were drawn away from their markets to those of France and Luxembourg.

Unconvinced by the responses to its formal notice,⁴⁵⁹ the Commission issued reasoned Opinions directed towards each State on 25th October 2012, giving them one month to

intervention, and impossible to ensure in the absence of information technology.’ E-books would clearly fall within this definition. Implementing Regulation of the Council No 282/2011 of 15 March 2011 Laying Down Implementing Measures for Directive 2006/112/EC on the Common System of Value Added Tax (‘Implementing Regulation 282/2011’) OJ L77/1 of 23.03.2011.

⁴⁵⁷ Emphasis added.

⁴⁵⁸ In both countries, the equalisations were effective from 1st January 2012. The Luxembourg law - Paragraph 39(3) of the Law of 12 February 1979 on value added tax, in combination with Circular No 756 12 December 2011 of the Luxembourg Land Registration and Estates Department - provided for a super reduced rate of 3% VAT to be applied to physically embodied books and intangible book content alike. The French law - Article 278-0a of the General Tax Code - provided for a rate of 5.5% to be applied to ‘books, including their rental... on all types of physical support, including those supplied via download.’ for a broader discussion of these provisions see Chapter 2.IV of this thesis.

⁴⁵⁹ The French response was by letter dated 3rd August 2012 (Case C-479/13 *Commission v France*, [13]) the Luxembourg response by letter dated 31 July 2012 (see Case C-502/13 *Commission v Luxembourg*, [22])

bring their respective legislation into line with EU law. The two States responded⁴⁶⁰ but the Commission was still not satisfied with the explanations of either. As such, it brought actions under 258 TFEU against each State for failure to fulfil their obligations under Articles 96 and 98 of the VAT Directive, read in conjunction with its Annexes II and III and Implementing Regulation 282/2011.⁴⁶¹ Because of the application of a super-reduced rate by Luxembourg, those proceedings also referred to Articles 110 and 114.⁴⁶² The cases were brought by the Commission by way of separate infringement procedures ‘because the VAT rates [France and Luxembourg] are applying to digital books are potentially incompatible with EU law’ since ‘under the Directive, e-books constitute electronically supplied services, and application of a reduced rate to this type of services is excluded.’⁴⁶³ Both sets of proceedings were based on a single plea, ‘alleging that, by subjecting the supply of electronic books to a super-reduced rate [...], the national legislation is not compatible with the VAT Directive.’⁴⁶⁴ Although the press releases of the Commission also highlighted competition concerns⁴⁶⁵ raised by the unilateral reductions in rates as a result of the place of supply taxation system then in place⁴⁶⁶, a discussion of this aspect is outside the scope of this chapter. It can be noted that with the change to country of destination taxation for B2C transactions, effective as of 1st January 2015, the competition concerns have now been largely eliminated as the ability

⁴⁶⁰ France by letter dated 23rd November 2012 (Case C-479/13 *Commission v France*, [14]) the Luxembourg response by letter dated 29 November 2012 (see Case C-502/13 *Commission v Luxembourg*, [23])

⁴⁶¹ Case C-479/13 *Commission v France*; Case C-502/13 *Commission v Luxembourg*.

⁴⁶² As well as introducing the dual rate system, the 1992 Directive also enabled Member States to maintain existing reduced rates or exemptions lower than 5% if they were already in place on the 1st of January 1991 and so long as they met the criteria set out by the sixth Directive that they ‘have been adopted for clearly defined social reasons and for the benefit of the final consumer’. See the Consolidated VAT Directive (v.2013), Article 110. The CJEU rejected Luxembourg’s argument for extending its super reduced rate to e-books on the basis that the possibility to apply super reduced rates below the minimum in the Directive allowed was contingent on this being ‘in accordance with Community law’; the Court had already found this not to be the case. Further, regards Article 114, that provision could only be employed where the goods and services at issue were to be found in Annex III; again, the court had already found that e-books could not be read as coming within point 6 of this Annex.

⁴⁶³ European Commission (2012), ‘Commission Questions France and Luxembourg About Reduced VAT Rate on Digital Books’ (Press Release), Brussels, 03.07.2012.

⁴⁶⁴ In the case of France the rates at issue were a super-reduced rate of 7% from 1 January 2012, then of 5.5% from 1 January 2013, the national legislation is not compatible with the VAT Directive. For Luxembourg, this was ‘a super-reduced rate of 3% from 1 January 2012’. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*. Case C-479/13 *Commission v France (E-Books Reduced Rates)*.

⁴⁶⁵ The Commission noted: “This situation is creating serious distortions of competition that are damaging to economic operators in the other 25 Member States since digital books can easily be purchased in a State other than the one where the consumer resides and, under the current rules, the VAT rate applies is that of the provider’s, not the customer’s, Member State.” See European Commission - Commission Questions France and Luxembourg (2012).

⁴⁶⁶ Article 45 provides the rule for the treatment of services provided to non-taxable persons (end consumers). Until 1st January 2015, VAT was to be paid at the rate of the country in which the *supplier* was established. Prior to the 2015 changes, CoD taxation for B2C transactions was the exception : e.g. Article 58 provides that where electronic services are provided by a third-country supplier to a consumer based in the EU, the place of VAT liability is the country in which the consumer is established; Article 59 provide that where a EU-based firm provides such services to a non-EU consumer, the VAT liability arises in the country of the consumer and need not be borne by the supplier. For B2B transactions, be they for goods or electronic services, VAT has always been payable in the country of the taxable customer, and VAT is remitted by that taxable customer (‘reverse charging’) (Article 44). The problem of VAT registration in the country of the customer therefore not an issue for B2B transactions. Consolidated VAT Directive (v.2013).

for consumers to ‘forum shop’ has been removed.

I. *Article 98: Exclusion of ESS from reduced rates*

In 2002 an amendment to Article 98 sealed the scope of the reduced rates by excluding ESS from Annex III.⁴⁶⁷ This article now reads:

“Article 98

(1) Member States may apply either one or two reduced rates.

(2) The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

The reduced rates shall not apply to electronically supplied services.”

In order to understand this exclusion, we can firstly look at the legislative background to the addition of the second paragraph of Article 98(2). We will then look at the categorisation of e-books as ESS, focusing in particular on the rulings of the CJEU in the French and Luxembourg cases.

a. The 2002 amendment to exclude ESS from reduced rates

The 2002 amendment is best analysed by back-stepping to consider the broader picture at the time. The dotcom boom of the late 1990s had increased trade over the Internet, and in particular content was now being transmitted electronically in a way that had previously not been foreseen by the VAT framework. Although physical goods bought and sold via the Internet could be dealt with under the existing rules for distance sales, provisions on how ESS were to be treated were lacking.⁴⁶⁸ The Commission has been (and continues to be) steadfast in its reluctance to expand the scope of reduced rates; it sees them as disruptive to the internal market project because of the scope for variations between MS that they permit. In 1998 it had already started to take stock of the changes the Internet could bring in the shape of intangibles and in its Communication on Indirect Taxation and E-Commerce it set out its stance that electronic deliveries of digital content should be treated as supplies of services rather than goods, an issue that

⁴⁶⁷ ESS Directive (2002).

⁴⁶⁸ European Commission (2000), ‘Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EEC) No 218/92 on Administrative Co-Operation in the Field of Indirect Taxation (VAT) and Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EEC) No 218/92 on Administrative Co-Operation in the Field of Indirect Taxation (VAT) and Proposal for a Council Directive Amending Directive 77/388/EEC as Regards the Value Added Tax Arrangements Applicable to Certain Services Supplied by Electronic Means’, COM(2000) 349 final, Brussels, 07.06.2000, 1.2.

has already been examined in the exhaustion chapter of this work.⁴⁶⁹ This position was endorsed by the ECOFIN Council later that year:

“A supply that results in a product being placed at the disposal of the recipient in digital form via an electronic network is to be treated, for VAT purposes, as a supply of services [...] Products that are, in their tangible form, treated for VAT-purposes as goods are often referred to as ‘virtual’ goods when they are delivered by electronic means.”⁴⁷⁰

From this it is clear that ESS would cover intangibly delivered content, but not e-commerce transactions for physical books or audiobooks. However, the European Parliament and European Economic and Social Committee (EESC) were both critical of this approach, although their concerns at the time were principally with the difference in treatment between ‘CD-ROMs with content identical or analogous to that of books’ and print books, rather than intangible e-books.⁴⁷¹ The European Parliament pointed out that the proposal entailed ‘[d]iscrimination of some digital products (i.e. services) in relation to their physical counterparts’⁴⁷², but in the end accepted it. The EESC was also concerned, observing that:

“There is potential for anomalous situations to arise where a service provided by electronic means is taxed at a different rate from that applied to an identical service provided by conventional means.”⁴⁷³

⁴⁶⁹ European Commission (1998), ‘Communication from the Commission to the Council, the Parliament and the Economic and Social Committee on Electronic Commerce and Indirect Taxation’, COM(1998) 374 final, Brussels, 17.06.1998, p. 6.

⁴⁷⁰ Council of the European Union (1998), ‘Conclusions of the 2112nd Economic and Financial Affairs (ECOFIN) Council Meeting’, PRES/98/234 20/07/1998, Brussels, 06.06.1998, Point 2. <http://europa.eu/rapid/press-release_PRES-98-234_en.htm>, accessed 27.02.2014.

⁴⁷¹ European Parliament (1998), ‘Resolution on the Report from the Commission to the Council and to the European Parliament in Accordance with Article 12(4) of the Sixth Council Directive of 17 May 1977 on the Harmonisation of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment (Com(97)0559 - C4-0119/98)’, A4-0252/98 OJ C313/192 12.10.98, Brussels. European Parliament (1998), ‘Report on the Report from the Commission to the Council and to the European Parliament in Accordance with Article 12(4) of the Sixth Council Directive of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment’, A4-0252/98, Brussels, 28.06.1998, p. 9.

⁴⁷² European Parliament (2000), ‘Report on 1. The Proposal for a European Parliament and Council Regulation Amending Regulation (EEC) N° 218/92 on Administrative Co-Operation in the Field of Indirect Taxation (VAT) (Com(2000) 349 - C5-0298/2000 - 2000/0147(Cod)) and 2. The Proposal for a Council Directive Amending Directive 77/388 EEC as Regards the Value Added Tax Arrangements Applicable to Certain Services Supplied by Electronic Means (Com(2000) 349 - C5-0467/2000 - 2000/0148(Cns))’, A5-0362/2000, Brussels, 28.11.2000, p.19-20.

⁴⁷³ Economic and Social Committee (2000), ‘Opinion on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EEC) No. 218/92 on Administrative Cooperation in the Field of Indirect Taxation (VAT) and the Proposal for a Council Directive Amending Directive No. 77/388/EEC as Regards the Value Added Tax Arrangements Applicable to Certain Services Supplied by Electronic Means

, ECO/045, Brussels, 29.11.2000, Point 4.4.

From the legislative documents, it is clear that both the Parliament and EESC saw scope for traditional books and digital books, whether on CDs or ‘virtual’ to be comparable products. The Commission noted that it had ‘received repeated requests concerning the application of a reduced rate to digital media, e.g. CDs, CD-ROMs and DVDs’⁴⁷⁴ with operators ‘increasingly claiming that they are unable to benefit from a genuine internal market.’⁴⁷⁵ Nonetheless, the Council endorsed the categorisation of digital content delivery as ESS and approved the amendment to Article 98 that would block ESS from being subject to reduced rates, noting that:

“Some critics have drawn attention to what they perceive as an inconsistency with the fact that certain Member States apply reduced or zero rates of VAT to printed material such as books, newspapers and periodicals. However, the argument that there is direct equivalence with digital information services (to which the standard rate of VAT will apply under the new rules) is difficult to sustain. By their nature, they are fundamentally different products and they should not necessarily be taxed identically.”⁴⁷⁶

b. E-books as ESS

E-books do not appear noted in the indicative list of such services that is to be found in Annex II to the VAT Directive, however ‘the digitised content of books and other electronic publications’ is noted in Annex I to the Council Implementing Regulation 282/2011⁴⁷⁷ as coming within point 3 of Annex II of the VAT Directive (the ‘supply of images, text and information and making available of databases’).

In 2013 (non-legally binding) statement of the VAT Committee⁴⁷⁸ ‘unanimously confirm[ed]’ that e-books are ESS and that they cannot as such benefit from reduced

⁴⁷⁴ European Commission (2001), ‘Report from the Commission on Reduced VAT Rates Drawn up in Accordance with Article 12(4) of the Sixth Council Directive of 17 May 1977 on the Harmonisation of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment’, COM(2001) 599 final, Brussels, 22.10.2001, Point 41.

⁴⁷⁵ Ibid, Points 52 and 58.

⁴⁷⁶ European Commission, ‘European Commission Welcomes Council Adoption of Rules for Application of VAT to Electronically Delivered Services’, (Press Release), Brussels, 07.05.2002, IP/02/673.

⁴⁷⁷ The Implementing Regulation implements Directive 2006/112/EC on the common system of VAT, which in Annex III of its original version provided that ‘books’ could benefit from reduced rates. This point of the Annex was amended by Directive 2009/47/EC as described below. See VAT Directive; Directive 2009/47/EC of the Council of 5 May 2009 Amending Directive 2006/112/EC as Regards Reduced Rates of Value Added Tax (‘Reduced Rates Amendment Directive’) OJ L116/18 of 09.05.2009.

⁴⁷⁸ The VAT Committee is established under Article 398 of the VAT Directive. It consists of representatives of the Commission and of the MS and has as its remit the promotion of the uniform application of the VAT Directive. Decisions of the Committee are not legally binding, although under Article 397 VAT Directive if the Council unanimously agrees Guidelines issued by the Committee can be transformed into directly applicable binding implementing measures.

rates of VAT.⁴⁷⁹ Most recently, this has been confirmed by the CJEU in the cases against France and Luxembourg. In both cases the Court found that:

“[S]ince the supply of electronic books is an electronically supplied service within the meaning of the second subparagraph of Article 98(2) of the VAT Directive, and since that provision precludes the possibility of applying a reduced rate of VAT to such services, it is not possible to interpret point 6 of Annex III to the VAT Directive to include within its scope the supply of electronic books without failing to have regard to the EU legislature’s intention that a reduced rate of VAT should not apply to those services.”⁴⁸⁰

From this extract it is already clear that this aspect of the VAT Directive sets up a roadblock for States wishing to apply the same reduced rates as a matter of cultural policy to e-books as they do print books or books on CDs. However, in both cases the CJEU continued to elaborate on the interpretation of Annex III point (6), reinforcing the double hurdle of such an approach.

2. *Re-wording of Annex III point (6) to cover ‘books on all physical means of support’*

Even without the categorisation as ESS that cannot be subject to reduced rates, the Commission was from an early point adamant that even books on CD-Roms, let alone intangible e-books, could not fall within the definition of ‘books’ for the purposes of Annex III.⁴⁸¹ Until 2009, point 6 referenced only ‘books’, without the now-existing stipulation that they be physically embodied. From the Commission’s perspective, as an exception to the standard rate⁴⁸² the scope of Annex III was to be read narrowly:

“Any extension of the reduced rate would [...] require the development of a new philosophy for its justification and it is likely that the cultural and educational consideration alone will not provide a practical criterion.”⁴⁸³

From March to May 2008 the Commission ran a public consultation on the issue of reduced rates and proposed a Directive later that year.⁴⁸⁴ The publishing industry was

⁴⁷⁹ Consolidated VAT Directive (v.2013), Article 98.

⁴⁸⁰ Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [40]; Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [47].

⁴⁸¹ European Commission (1997), ‘Report from the Commission to the Council and the European Parliament in Accordance with Article 12(4) of the Sixth Council Directive of 17 May 1977 on the Harmonisation of the Laws of the Member States Relating to Turn-over Rates - Common System of Value Added Tax: Uniform Basis of Assessment’, COM(97) 559 final, Brussels, 13.11.1997.

⁴⁸² Citing previous case law, this is also noted by the CJEU in the France and Luxembourg cases, at [30] and [38] respectively.

⁴⁸³ EC - Report on VAT (1997), p. 14.

aware of difficulties arising where the scope of the reduced rate allowance affected competition between digitised audiobooks and analogue print books: As such, they began to push hard for recognition that audiobooks would fall within the scope of Annex III point 6. However, their focus did not include e-books which, as has been examined above would also require a change to the Article 98 reference to ESS. This is not to say that e-books were not brought to the attention of the Commission,⁴⁸⁵ however a detailed explanation of its proposal highlights that at that moment in time the main concern was to rectify out the situation of audiobook content, rather than considering also e-books:

“The current wording covers only books on paper support. For reason of neutrality, an extension is necessary in order to also cover books that are on CD, CD-ROMs or any similar physical medium that predominantly reproduce the same information content as printed books. Thus, only recordings that fundamentally reproduce the written text in a book are covered. A recording that includes supplementary material such as games, search functions, links to other material and similar, apart from the text read aloud, continues to be subject to the normal VAT rate.”⁴⁸⁶

The intention of the amendment was thus to broaden the reduced rate exception from paper only to paper and digital audio or text content contained on a physical medium.

Although the limitation to ‘books [...] on all physical means of support’ was included in the original Commission proposal for an amendment to the wording of Annex III, however it could be argued that the proposed version left more scope for manoeuvre to because of its more open structure :

⁴⁸⁴ European Commission (2008), ‘Proposal for a Council Directive Amending Directive 2006/112/EC as Regards Reduced Rates of Value Added Tax’, SEC(2008) 2190, SEC(2008) 2191, Brussels, 07.07.2008.

⁴⁸⁵ In the Summary Report on the Public Consultation, the Commission notes that: ‘There were suggestions that the reduced rate applied to supplies of books, newspapers and periodicals might need to be updated to also cover the supplies of these products in electronic form as it would result in an equal reduced rate treatment of classic and similar digital goods’ and ‘online versions of books, newspapers and magazines’ were suggested as a new category and that distortions of competition were noted between ‘audiobooks and e-books (standard rate) vs. printed books (reduced, super reduced or zero rate)’. (European Commission (2009), ‘Summary Report of the Outcome of the Public Consultation ‘Review of Existing Legislation on VAT Reduced Rates’ (March-May 2008)’, TAXUD-D1 SY (09)D/24191, Brussels, 24.02.2009, p.14 and p.15.)

⁴⁸⁶ EC - Proposal for a Directive Amending Directive 2006/112/EC as Regards Reduced Rates of VAT (2008), p. 8. At p.11 it also noted that “It is necessary to include technical adaptations in order to clarify, update to technical progress or remove current inconsistencies. In particular, these adaptations should give the same possibility to apply a reduced VAT rate [...] to audio books, CD's, CD-ROMs or any physical support that predominantly reproduce the same information content as printed books”

‘books (including brochures[...]or similar charts, *as well as audio books, CD, CD-ROMs or any similar physical support that predominantly reproduce the same information content as printed books*)’.⁴⁸⁷

If the Commission’s original version had been adopted, it may well have been possible to argue that this would bring e-books within the scope of Annex III, thus requiring only a change to Article 98’s exclusion of ESS to allow reduced rates to be applied. This point was made by Luxembourg and Belgium in the *Commission v Luxembourg* case, however the Court – agreeing with the Commission – dismissed this argument, finding that the wording adopted was ‘nothing other than a simplification of the drafting of the originally proposed text’.⁴⁸⁸

3. *The Commission v France and Commission v Luxembourg e-book cases: The end of the story?*
Ultimately, since *Commission v Luxembourg* and *Commission v France*, we can be sure firstly that under the current VAT Directive e-books are to be considered ESS, and excluded from reduced rates for this reason, and secondly, that e-books were additionally not intended by the EU legislature to be included within point (6) of Annex III. Curtly, the Court gets down to business by dismissing the arguments of France and Luxembourg – each supported by the Kingdom of Belgium – that e-books are covered by point 6 of Annex III. In its view, any other interpretation would render the wording which refers to ‘the supply of books [...] on all physical means of support’ meaningless. While the Court does accept that e-books need a physical support to be read (e.g. a computer, e-reader or tablet) this does not alter its opinion because these devices are not included in the ‘supply’ of e-books and because of the nature of the provision as an *exception* to the standard rate, which means it is to be interpreted strictly.⁴⁸⁹ The Court without hesitation finds that the legislative intent was to exclude e-books by the addition of the wording ‘on all physical means of support’ in the 2009 amendment.⁴⁹⁰

Independent of the question of whether or not e-books can be read as coming within point 6 of Annex III, the Court swiftly highlights that the fact remains that ‘the EU legislature decided to exclude any possibility of a reduced rate of VAT being applied to [ESS]’ and that e-books are ESS.⁴⁹¹ It draws this, predictably, from the negative definition of ‘services’ in Article 24(1) as well as the even more apposite reference in the

⁴⁸⁷ Ibid. Emphasis added.

⁴⁸⁸ Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [52-53].

⁴⁸⁹ Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [28-30], [35]. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [36-38], [42].

⁴⁹⁰ Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [31]. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [52-53], [39].

⁴⁹¹ Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [33]. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [40].

2011 Implementing Regulation verifying that ‘the digitised content of books and other electronic publications’ are ESS.⁴⁹² This conclusion was not altered by the plainly rather hopeless argument of Luxembourg that the 2009 Directive, which was intended as an update to ‘technical progress’, amended the scope of Article 98(2) insofar as it excludes ESS from reduced rates, since this would be ‘at odds with the very terms of the latter provision’.⁴⁹³

Finally, the Court looks into the arguments of the parties, again supported by Belgium, that excluding e-books from reduced rates would undermine the principle of fiscal neutrality. Fiscal neutrality was developed by the ECJ to reflect, in VAT matters, the general principle of equal treatment. It has been central to the functioning of the EU VAT system because of the close link between neutrality and competition: Differences in treatment affect competition and the functioning of the internal market.⁴⁹⁴ The Court referred to its previous case law to highlight that fiscal neutrality cannot extend the scope of reduced rates of VAT to the supply of electronic books.⁴⁹⁵ It referred here to its previous ruling in *Zimmermann*, which found that fiscal neutrality ‘is not a rule of primary law against which it is possible to test the validity of an exemption [...] Nor does that principle make it possible for the scope of such an exemption to be extended in the absence of an unequivocal provision to that effect.’⁴⁹⁶

The Court expressly states in the Luxembourg case that the infringement action at hand cannot be used to challenge the validity of the Directive in light of the principle of equal treatment, at least not without serious and manifest defects leading to a categorization as a ‘non-existent act’.⁴⁹⁷ Thus, in this respect too, the arguments of the parties were brought to an abrupt halt.

Landing with a rather dull thud, the two cases of 5th March 2015 were stony and procedural, and contained no hint of the policy flair that has surrounded the reduced rates debate. However, while these cases clearly answer the question of whether e-books can be subject to reduced rates under the current VAT Directive with a resounding ‘no’,

⁴⁹² Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [40]. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)* [47].

⁴⁹³ Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [48].

⁴⁹⁴ See P Rendahl, *Cross-Border Consumption Taxation of Digital Supplies* (Amsterdam: International Bureau of Fiscal Documentation (IBFD) 2008), p. 72 et al.

⁴⁹⁵ Case C-479/13 *Commission v France (E-Books Reduced Rates)*, [42-43]. Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)* [50-51].

⁴⁹⁶ Case C-174/11 *Zimmermann* EU:C:2012:716, [50].

⁴⁹⁷ Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*, [55-56].

this may not necessarily be the end of the story. At the political level there still seems to be an impetuosity to change this framework with pleas continuing from many MS; this aspect of the debate is considered in Part III of this Chapter.

II. EQUAL TREATMENT ANALYSIS

I. *The objective of reduced rates of VAT*

Allowing books to benefit from a reduced VAT rate is a form of indirect subsidy.⁴⁹⁸ It can be seen as a subsidy because, in applying an exception to the normal rate, governments accept that there will be a cut in the public purse as a result of this difference. This tells us something interesting about the choice to employ such a policy: That the polity is not solely interested in maximising the economic contribution of the book publishing industry to the state budget, but that it is also committed to increasing uptake of reading as an educational venture. The hoped-for but subordinate objective is that this will result in a qualitative strengthening of the book publishing industry, its structure and its economic contribution.

Along these lines, the objectives of reduced VAT rates can be divided into two categories. Firstly, there is the primary general interest motivation in increasing reading; a reduction in price will – it is thought – increase readers' inclination to purchase books. Secondly, there are the supply chain benefits that come from this increase in buying behaviour.

Although the purpose of this work is not to query whether reduced rates actually achieve their objectives, it is worth reiterating that the ability of VAT reductions to actually achieve their objectives is not certain. The key to the system is that reduced rates of VAT translate into reduced prices for consumers, which in turn stimulate consumer demand; this is the essential element for the system to 'work'. While some studies have certainly indicated that such systems cannot be effective⁴⁹⁹, others – including one focussing on the book industry – have found that '[t]he empirical evidence from major changes in VAT rates supports the conclusion that changes of VAT rates to a very large extent are passed on to consumers'⁵⁰⁰ or even that there is a 'strong tendency towards full pass through'.⁵⁰¹

⁴⁹⁸ J Ahearne, 'Cultural Policy Explicit and Implicit: A Distinction and Some Uses' (2009) 15 (2) *International Journal of Cultural Policy* 141, pp. 141-153. JM Schuster, 'Tax Incentives in Cultural Policy', in Victor Ginsburgh and Throsby C. D. (Ed.), *Handbook of the Economics of Art and Culture* (Amsterdam; Boston [Mass.]: Elsevier North-Holland 2006).

⁴⁹⁹ R de la Feria, 'Blueprint for Reform of VAT Rates in Europe', Oxford University Center for Business Taxation, WP 14/13 Oxford, at p. 21-23.

⁵⁰⁰ Copenhagen Economics and European Commission, 'Study on Reduced VAT Applied to Goods and Services in the Member States of the European Union', Brussels, at p. 41.

The principal argument behind reduced rates of VAT for books is that there is a *general interest* in maintaining an accessible and diverse sector for published content.⁵⁰² This is an equity enhancing objective because the consumption of merit goods produces benefits for society. An increase in consumption through reduced rates is foreseen primarily through the price reduction passed on to consumers, but also – it can be argued – because where the system enables the reduced rate to filter through the supply chain, the margins at the production and retail levels are better, enabling a greater diversity of titles and a better stock holding.

One part of the equity enhancing logic is that by reducing end-prices for consumers they make products or services available to low-income groups that would not otherwise have access to or participate in the market. The reason for applying reduced rates to sectors that are ‘under-consumed’ is to make ‘cultural (merit) goods more available for low income households or to stimulate consumption of goods with positive externalities’⁵⁰³ and ‘diminish the counter-redistributive effect attributed to VAT’⁵⁰⁴. Reduced rates can in this sense be seen as a way of promoting more equal income distribution because an increase in reading behaviour in turn leads to greater education and employability. The distributional justification for reduced rates is particularly prominent throughout the cultural sectors, not only for book policy, but to also justify VAT reductions for cultural events (e.g. reduced VAT on ticket prices). However for books the effectiveness of this re-distributive aspect can be questioned because the consumption of books in low-income households is generally lower anyway; the risk is that the price reduction will not in fact benefit the target group but will instead form a type of subsidy for those higher-income groups who would consumer books at any rate. From a policy perspective, this has not put governments off implementing reduced rates.⁵⁰⁵ As such, we can say that the objective of reduced rates seems less aimed at increasing the consumption of books by the less-well read parts of society and instead tries to increase the availability of books –

<http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/study_reduced_vat.pdf>, accessed 12.02.2014. This study gives the examples of a 10% VAT rise for periodicals in Italy in 2002, which led to a price rise of 14% and the 19% VAT reduction on print books in Sweden in 2001 which led to a reduction in prices of 12%. The study notes that “This corresponds to a pass-through to prices of 134 and 80 percent respectively. Given the uncertainty involved in the estimations, this is close to a full pass-through.”

⁵⁰¹ Ibid, p. 103.

⁵⁰² See F Rouet, ‘VAT and Book Policy : Impacts and Issues’, Council of Europe, Cultural Policies Research and Development Unit, Policy Note No. 1, at p. 22. In this sense, the arguments are quite similar to those for retaining FBP.

⁵⁰³ Copenhagen Economics and European Commission, ‘Study on Reduced VAT Applied to Goods and Services in the Member States of the European Union’ (2007), p. 6

⁵⁰⁴ Rouet, ‘VAT and Book Policy : Impacts and Issues’ (1999), p. 23.

⁵⁰⁵ Ibid.

their readiness to be consumed – for anyone who wishes to access them, even if this effectively means reduced rates form a subsidy for established frequent readers.

We can link this part of the logic to broader supply chain benefits. In addition to the equity enhancing objectives, reduced rates are adopted in the hope that with the reduced prices leading to an increase in purchasing behaviour, the supply chain will also be stimulated. In this sense, reduced rates can be considered as efficiency enhancing: Increased demand means increased production. Depending on the VAT system in place within each MS, VAT reductions can bring a ‘fiscal shock-effect’⁵⁰⁶ to the supply chain by increasing margins if there is a reduction of VAT remitted throughout, or at least partially up the supply chain, and not only at the retail level.

The level of the ‘shock’ to the supply chain depends firmly on the VAT system of the MS in question. Where only the VAT paid by consumers is reduced, there are no direct supply chain benefits, but there can be indirect effects, some of which are noted below. Where VAT is also reduced up the supply chain, at the production levels, the whole industry benefits from the reduction. This is because the VAT remitted by all players (publishers, printers, editors, typesetters, etc) for their services will be reduced.

By way of example, in France all activities that go into producing a book are subject to the same reduced rate.⁵⁰⁷ In contrast, in the UK, ‘services related to the production of goods’ are subject to the zero rate, whereas ‘services of an original or specialist nature’ are always subject to the standard rate. Under this system, a manuscript of an author or a translation are both standard rated, but printing or publishing a book (‘producing’ it) are zero rated.⁵⁰⁸ The exact consequences of a reduction of VAT therefore depends on the ‘mechanics’ of the system. However, as noted by Rouet the objective of improving the supply chain is not a stand alone objective which can be abstracted from the intention of increasing book consumption: ‘it would be rather paradoxical if the adjustment of a tax on consumption were not to be of direct benefit to the consumer, and were used solely as an instrument of sectoral policy, whatever the undeniable indirect repercussions in the purchasers favour.’⁵⁰⁹

Lastly, regardless of the ‘mechanics’ up the supply chain, a reduction in VAT can have indirect effects even if a ‘fiscal shock-effect’ does not occur. Increasing purchases by consumers increases turnover, and increased turnover leads to less risk-adversity. This

⁵⁰⁶ Ibid, p. 35.

⁵⁰⁷ Ibid, p. 36.

⁵⁰⁸ UK - HMRC - Zero-Rating of Books (2010).

⁵⁰⁹ Rouet, ‘VAT and Book Policy : Impacts and Issues’ (1999), p. 38.

can be at either the retail level (booksellers are more willing to stock 'risky' titles that might not sell) or at the production level (publishers are more willing to back unknown authors or publish 'grave scientific works'⁵¹⁰). Multifold other benefits may occur: Publishers may order larger print runs benefitting also printers and creating economies of scale which can lead to further reductions in prices; innovations may take place that would not otherwise happen with the leeway offered by greater margins, etc.

2. *Do the objectives translate to e-books?*

With the above objectives of reducing the rate of VAT on books in mind, we must now ask whether these objectives translate into the intangible context. Here, it is worth reiterating that the exact effects of reducing VAT depend on the mechanics of the system. This section does not pinpoint a specific system because the equality rhetoric and VAT equalisation issue addressed in this thesis is of a more general nature; the question of whether to allow for reductions in VAT rates for intangible books is to be made at the EU level and it is *then* for the MS to decide whether these fit with the specific objectives of their system.

As noted above, the general objective for reducing VAT rates is to promote access to books. This public interest holds for all the MS implementing such a system and the logic is transferrable to e-books, even if the supplementary supply chain benefits may vary: lower price equals a greater likelihood that consumers will purchase e-books. However, although influencing consumer purchasing behaviour is the core motivation here, there are differences between books and e-books that mean some of the supplementary objectives cannot be achieved, or may be altered.

If the reduced rate does filter through to the production level, in the e-book context the supply chain may not be stirred to the extent intended; increased demand for e-books would not mean an increase in workforce to keep production in line with demand (marginal costs for e-books are nil, or very close to it). Furthermore, the same supply chain benefits cannot be foreseen in the e-book environment, as is shown from the French government's arguments in support of reducing its e-book VAT rate. The motivation there is to increase overall tax revenues by causing a dual stimulation of the e-book market as well as the e-reader market: increased interest in e-books, resulting from their more affordable price,⁵¹¹ would lead to an increased uptake of dedicated e-

⁵¹⁰ CW Guillebaud, 'The Marshall-Macmillan Correspondence over the Net Book System' (1965) 75 (299) *The Economic Journal* 518, p. 538.

⁵¹¹ France - Report on reduced rates of VAT for e-books (2011), pp. 28-29.

reader devices.⁵¹² This would bring in substantial VAT revenue from hardware sales, an appealing income stream for the government that does not exist in the print book context. Here, the motivation is to stimulate the supply chain, but it is a different chain and for different reasons. Due to the interconnection between e-books and hardware, it could be that reduced rates for e-books are actually more economically justifiable – in terms of visibility of payback – for governments than was the case for print books.

Although reduced rates may stimulate demand and therefore bring economic benefits, the French approach maintains that the principal reasoning is cultural: increasing reading and output of the publishing sector is perceived as being in the general interest rather than in the economic interest of the country even at this time of on-going financial crisis.⁵¹³

The support for equalisation shown by other governments, the EP and the Commission itself shows that the cultural justifications for reduced rates seem to retain their importance in the digital context. The surprising element in this is that such stances are to be read against a background where especially at the EU policy level there seems to be a shift occurring away from the societal and cultural and towards the economic potential of the creative industries.⁵¹⁴ This could mean that the objective of reduced rates as promoting dissemination of culture has been altered. The Digital Agenda for Europe⁵¹⁵ ‘falls into the current trend of treating culture and culture industries as vehicles of economic growth⁵¹⁶’; as such, making the digital market as competitive and appealing as possible for consumers and businesses, including from a VAT perspective, should be a priority. However, within the digital Agenda framework VAT is only mentioned in passing, and differing VAT rates for physical and electronic services are not mentioned at all. This has led one author to make comment that:

“[W]hile the EU Commission seeks to complete a Digital Single Market by 2020, it does not consider the possible VAT obstacles to trade, such as inefficient collection mechanisms in an intangible environment. It is clear, however, that

⁵¹² ‘Any tax incentives in e-book prices should books sales of such [dedicated e-reading devices [that]are designed for reading]’ *ibid*, p. 31. The report does not take into account of tablet computer sales, which are not specifically used for reading.

⁵¹³ *ibid*.

⁵¹⁴ European Commission (2010), ‘Green Paper: "Unlocking the Potential of Cultural and Creative Industries"', COM/2010/0183 final, 27.04.2010.

⁵¹⁵ European Commission (2010), ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe’, COM(2010) 245 final/2, Brussels, 26.8.2010.

⁵¹⁶ T Colbjørnsen (2013), ‘Global E-Commerce and National and EU Policies: The Case of Value Added Tax on Ebooks in Europe’, 6th Nordic Conference on Cultural Policy Research 2013, in Copenhagen Business School, 14-16.08.2013, p. 15.

these inefficiencies constitute a major obstacle to making the digital market a reality, and that they should be tackled accordingly.”⁵¹⁷

The shift from viewing creative industries as vehicles of culture to vehicles of growth is linked to the nature of increasingly converged media that makes it more difficult to extract e-books from sales of hardware, and other media (audio, video) from e-books where these become increasingly interactive. The re-focus, which at present remains subtle rather than being an explicit policy approach is not necessarily a bad thing – it may indeed encourage the creators to up their ante and embrace technology – however it is worth noting when we are considering the impacts of e-books on the way VAT works, as detailed in the section below.

Although there are some differences between the structure of the physical and intangible book content supply chains, the core objective of making book content more affordable and accessible that underlies the application of reduced rates in the traditional context does seem to translate into the e-book environment. This is especially the case insofar as reduced prices should lead to stimulated demand, but is also at least to a certain extent true where this increased demand trickles through to benefit also other areas of production. From this, we can say that if we are using an objective-based standard for judging likeness and difference then the application of reduced rates should also be applied to intangible books.

III. DEBATES AND STANCES

This section highlights the many different levels involved in the VAT debate and the widespread agreement that a change in the legal framework is desirable. In addition, it serves to introduce some of the perceived impacts of e-books in the VAT context which will lead on to our next Section.

1. Member States other than France and Luxembourg

For a time, Spain applied the reduced rate of 4% to both e-books and print books, although in June 2011 with the threat of infringement proceedings looming this was reversed.⁵¹⁸ Both Italy and Malta entered to the fore of the controversy by providing – in December 2014 – for equalisation of their VAT rates on print books and e-book (4%

⁵¹⁷ M Lamensch, ‘Are ‘Reverse Charging’ and the ‘One-Stop-Scheme’ Efficient Ways to Collect VAT on Digital Supplies?’ (2012) 1 (1) World Journal of VAT/GST Law, pp. 12-13.

⁵¹⁸ <<http://publishingperspectives.com/2012/07/spain-hikes-e-book-vat-to-21-likely-slowing-growth/>>, accessed 12.01.2015.

and 5%) respectively from 1st January 2015.⁵¹⁹ However, given the impending changes to VAT remittance which will from the very same date be dependent on the consumer's origin, these changes will only really be of benefit to those living there. Of course, not only have these governments now to face the prospect of pursuit by the Commission, but they also face the challenge of showing that on the basis of fiscal neutrality, for Maltese and Italian customers intangible and physical transmission of content are comparable and therefore deserving of equal treatment.

Others have been steadfast, holding the position that although they would like to see an equalisation, this must come from the EU level because following in the footsteps of France and Luxembourg and risking EU action is too big a risk to take. The UK Tax authority – in the face of a significant lobby from the UK publishing sector – has said that if VAT is to be equalised, as things stand this could only be achieved by raising the VAT on print books because unilaterally, any MS is unable to broaden the scope of the VAT Directive.⁵²⁰ Germany has also been vocal on the VAT issue, and has lowered its rates for physically embodied audiobooks within the current scope of the Directive, but not for intangible e- or audio content.⁵²¹ (it can be noted that this move infers the that audio books on CDs/USBs and print books are comparable for consumers; a position that is in contrast to the decision of the Finnish Supreme Court implementing the CJEU's ruling in *K Oy*⁵²²). Germany still feels restrained by the EU legal context despite considering e-book VAT equalisation is the correct way forward. As Culture and Media Minister Monika Grütters (CDU) has stoically stated:

“For cultural policy reasons, the reduced VAT rate applied to printed books has to be adopted as well for electronic books. Only with such a measure will we be able to protect the diversity of our book offer in a digital environment. Reduced VAT rates have a strong impact on the citizens' capacity to access information and build up their own opinion. We need to get rid of barriers not only to books and

⁵¹⁹ L Campbell (2014), 'UK Isolated on E-Book VAT as Italy and Malta Cut Rates', The Bookseller. <<http://www.thebookseller.com/news/uk-isolated-e-book-vat-italy-and-malta-cut-rates>>, accessed 12.12.2014.

⁵²⁰ It is interesting to note also the stance of industry players: Although outspoken in their support of equalisation, they have been surprisingly restrained when approaching this subject with legislators. This can be explained by their to acknowledgment that they 'have it good' by receiving *any* reduced rate at all. Essentially, they are being careful not to rock the boat in case their demands for equalisation work against them (i.e. that in seeking equalisation within the current EU framework, the legislator achieves this by removing the benefit from print books). In 2012, Publishing Perspectives – dubbed “the BBC of the book world” – reported that “Antonio María Avila, executive director of the FGEE (Federation of Spanish Publishers Guilds), was swift to state that the government had been “kind” to the book industry.”

⁵²¹ L Campbell (2014), 'Germany Slashes Audiobook VAT, Pushes for E-Books Cut' (The Bookseller blog), posted 12.12.2014. <<http://www.thebookseller.com/news/germany-slashes-audiobook-vat-pushes-e-books-cut>> accessed ; Unknown (2015), 'Germany Downloadable Audio Books 19% VAT' (VATlive blog), posted 11.01.2015. <<http://www.vatlive.com/european-news/germany-downloadable-audio-books-19-vat/>> accessed 12.01.2015.

⁵²² Finnish Supreme Court, *Finnish Supreme Court Re: Audio Books*

newspapers as cultural goods but also to literary content and media coverage. This is independent from the question whether the reader really holds the book or the newspaper in his hand or downloads electronic content on his mobile reader.”⁵²³

2. *Responses to the European Commission’s 2012 Reduced Rate Review and industry perspectives*

Although politically speaking any extension of the scope of reduced rates is a difficult and sensitive subject, the majority of MS do appear to support such a move. This would seem to be helpful for obtaining the approval of the Council, however it should be borne in mind that reduced rates are something of an exception to the overall internal market harmonisation project and the Commission as well as the Council are by nature sceptical of any extension of them because of this.

In 2012 with a view to addressing addressed rates as a priority action area highlighted in its 2011 Communication on the future of VAT⁵²⁴, in 2012 Directorate General Taxation and Customs Union undertook a Public Consultation to review existing legislation on reduced VAT rates.⁵²⁵ Although the Communication is relatively unfavourable to reduced rates as a whole, Section 3.4 of the Consultation specifically addresses the point that ‘Similar goods and services should be subject to the same VAT rate.’⁵²⁶ The responses collected during the Consultation were principally in favour of equalisation of rates for book and e-books:

“Respondents almost unanimously called for an equal VAT treatment of printed books and e-books. Where a VAT reduced rate (or even a zero or super-reduced rate) is allowed for printed books it should also be applicable to e-books. The rationale behind this is that a book is a book whatever its format. They both deliver the same content to the end-user.”⁵²⁷

⁵²³ European and International Booksellers Federation (EIBF) (2014), ‘German Minister of Culture Monika Grütters in Favour of Reduced VAT Rates on E-Books’ blog, posted 07.05.2014. <<http://eibf-booksellers.org/pressrelease/german-minister-culture-monika-gr-tters-favour-reduced-vat-rates-e-books>> accessed 12.05.2015.

⁵²⁴ European Commission (2011), ‘Communication on the Future of VAT: Towards a Simpler, More Robust and Efficient VAT System Tailored to the Single Market’, (2011) 851 final, Brussels, 06.12.2011.

⁵²⁵ Available at <http://ec.europa.eu/taxation_customs/common/consultations/tax/2012_vat_rates_en.htm>, accessed 12.01.2015.

⁵²⁶ In this section, Question 6 asks “Do you agree that those electronic services that would qualify for the reduced rate will have to be precisely defined in a uniform way at an EU level or do you consider that a broad definition in the VAT Directive would be sufficient?” and question 7 follows this up by asking directly “Considering the need for a uniform and future-proofed approach at EU level, what should be the definition of an e-book in EU-law?”

⁵²⁷ Response to Q.7. European Commission (2013), ‘Summary Report of the Outcome of the Public Consultation on the Review of Existing Legislation on VAT Reduced Rates (8th October 2012-4th January 2013)’, taxud.c.1(2013)708070, Brussels, 29.04.2013, p. 16.

However, it is also noted that:

“A very limited number of respondents considered (or questioned) e-books as not being similar to printed books. They are not exchangeable products and therefore there is no need to apply the same VAT rate on their supplies, nor is it necessary to define an e- book.”⁵²⁸

What is particularly interesting is the section on ‘Features for a future-proofed definition of an e-book’, which looks to form a definition of an e-book from the responses to the review. The Commission does not settle on any of the suggestions provided, nor does it make a decision on whether a definition is actually necessary. It does highlight that:

“Some respondents found it difficult to propose a definition that would be flexible enough to keep pace with technological evolution. They proposed defining books from the point of view of the consumers’ needs they satisfy. Indeed, from the point of view of the consumers, content is more important than the type of data carrier.”⁵²⁹

The present author tends to agree with the concerns about defining an e-book, especially insofar as future proofing is concerned. However, *K Oy* puts the references to consumer use under a new light; if neutrality is the aim of any amendment, which would seem to be the case from the Commission’s perspective according to that decision it is the state of technological penetration in *each individual MS* which forms the basis for deciding whether neutrality is infringed. This means that to have a definition of an e-book for the purposes of the Directive that fits also with fiscal neutrality in all MS is impracticable at best, if not entirely nonsensical. Looking to the Press Release of the Commission after referring France and Luxembourg to the Court, it is plainly stated that ‘[o]ne of the guiding principles of the ongoing revision of VAT rates is that similar goods and services should be subject to VAT at the same rates and that technological progress should be taken into account.’

Perhaps surprisingly, there is a broad consensus that the difference in rates between print books and e-books should be remedied. In strong support, we see the publishers’ associations of the MS, with their objections to the current state of affairs being voiced through the umbrella organisation the Federation of European Publishers (FEP). The

⁵²⁸ Ibid.

⁵²⁹ Ibid, pp. 16-17.

rather startling element to the wider industry perspective is that across the board there appears to be an acceptance that something needs to be done about e-book VAT rates. Publishers want to increase e-book sales by making the cost more appealing without cutting into their margins; digital industry players – the very players we have grown used to seeing on the opposite side of the fence from the publishers – also have an interest in making e-books more appealing to consumers because of the necessity of hardware, which they themselves produce.⁵³⁰ For example, EDiMA, the industry association representing Amazon, Apple and Google amongst others⁵³¹ stated in a press release dated 4th of December 2014 that:

“We should encourage reading in all formats equally. A book is a book, irrespective of how it is enjoyed. To choose not to align VAT would abandon a historic commitment to reading and culture.”

3. *The Commission's Own Stance*

As has been noted at the very beginning of this thesis, a much reverberated statement of Neelie Kroes speaking as Commissioner for the Digital Agenda shows how outspoken the Commission has previously been on the subject of VAT equalisation:

“I think [allowing a reduced rate of VAT for e-books] would be good for our publishing sector; good for an education system increasingly trying to go digital; and good to remove artificial market distortions. After all, it is common sense that the same rules should apply to same products. I support such a consistent, non-discriminatory tax regime for paper and e-publications”.⁵³²

As should be clear by this point, the actions against France and Luxembourg were not taken as a policy initiative of the Commission, but rather came as a result of its role as ‘guardian of the Treaties’ which requires it to ensure that MS ‘respect the VAT rules

⁵³⁰ See discussion in Chapter 2.III.

⁵³¹ “EDiMA is the European trade association representing online platforms. It is an alliance of new media and Internet companies whose members include Allegro Group, Amazon EU, Apple, eBay, Expedia, Facebook, Google, LinkedIn, Microsoft, Nokia, Yahoo! Europe. EDiMA’s members provide Internet and new media platforms offering European consumers a wide range of online services, including e-content, media, e-commerce, communications and information/search services.” EDiMA, ‘European Digital Media Industry Calls on EU to Align VAT for Ebooks and Printed Books’, (Press Release), Brussels, 04.12.2014.

⁵³² N Kroes, (2013) ‘Making Europe the Home of Ebooks’, “L’Europe et le livre à l’ère du numérique”, Salon du Livre, Paris, 25/03/2013, SPEECH/13/262; OECD, ‘E-Books: Developments and Policy Considerations’, OECD Publishing. </content/workingpaper/5k912zxg5svh-en>. The OECD paper finds that regarding different treatment between physical and digital books “It may be argued that this constitutes a market distortion and that policy makers should therefore consider harmonising the VAT rate across physical and digital media for books.” (p. 7.)

they themselves unanimously approved.’⁵³³. Despite holding its position that the application of reduced rates in these two countries was leading to ‘serious distortions of competition’⁵³⁴, the Commission nonetheless acknowledged at the same time as it was pursuing these actions that ‘[o]ne of the guiding principles of the on-going revision of VAT rates is that similar goods and services should be subject to VAT at the same rates and that technological progress should be taken into account.’

Despite the Brussels grapevine whispering that such a proposal would be elaborated in the summer of 2014 and Commission President Jean Claude Juncker speaking out publically in favour of ‘technology neutral’ VAT (including for e-books)⁵³⁵, the Commission has said it will not propose any changes until 2016.⁵³⁶ With the rulings against France and Luxembourg it is now at least settled that MS are blocked from having the *opportunity* to equalise under the Directive, however maintaining the current situation has been judged untenable by several MS⁵³⁷ and the European Parliament which had already been active on this issue, calling for equal and favourable treatment of books in all formats. Demonstrative of this is the EP oral question by MEP Gallo and 42 other MEPs in support of equalisation and the subsequent debate between the Commission (which was against this) on one hand and – astoundingly – all MEP interventions from various parties on the other.⁵³⁸ In addition, there has been an EP resolution on modernising VAT recommends reduced rates for online cultural products and redressing the discrimination⁵³⁹ and after the CJEU rulings there has been a debate showing across the board support for equalisation.⁵⁴⁰ It seems that for the time it is simply a waiting game for the Commission to make a move to initiate an alteration of the legal framework: If then – as seems likely – equalisation by amending the VAT Directive is

⁵³³ European Commission (2012), ‘October Infringements Package: Main Decisions - Taxation: VAT on Electronic Books in France and Luxembourg’, (MEMO), 24.10.2012

⁵³⁴ *ibid.*

⁵³⁵ Jean-Claude Juncker (2015), ‘Für eine freie und unabhängige Presse in einem modernen Europa’ (Speech), SPEECH/15/4951, Speech at the BDVZ-Empfang in der Bayerischen Landesvertretung, Brüssel, 06.05.2015. <http://europa.eu/rapid/press-release_SPEECH-15-4951_en.htm?locale=FR>, accessed 15.05.2015.

⁵³⁶ European Parliament (2015), ‘Debate - Rules on VAT and VAT Mini One-Stop Shop (Moss) for Digital Services, Books and Papers in the EU’, Plenary, Strasbourg, 18.05.2015. <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150518+ITEM-019+DOC+XML+V0//EN&language=EN>>, accessed 18.05.2015.

⁵³⁷ Cultural Ministries of France - Italy - Germany and Poland (2015), ‘Joint Declaration on TVA for E-Books’, 19.03.2015. <http://www.euractiv.com/files/20151903_mcc-declaration-en.pdf>, accessed 18.05.2015.

⁵³⁸ European Parliament (2011), ‘Debate on Parliamentary Question: Modernisation of the VAT Legislation in Order to Boost the Digital Single Market’, Strasbourg, O-000226/2011 and PV 16/11/2011 - 15, 16.11.2011. <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20111116&secondRef=ITEM-015&language=EN>>, accessed 20.01.2015.

⁵³⁹ Comments of M Castex: Coalitions Européennes pour la Diversité Culturelle, ‘Minutes of Conference 11th of February 2014 – European Parliament How to Adapt Taxation Applying to Cultural and Audiovisual Goods and Services in the Digital Era?’. <<http://www.coalitionfrancaise.org/wp-content/uploads/2014/02/Compte-rendu-ANG-conf-11.2.2014.pdf>>, accessed 08.05.2014.

⁵⁴⁰ EP - Debate on Rules on VAT (2015).

proposed by the Commission following up to the Review of Reduced Rates, the Council has already declared that it commits itself to follow the Commission's lead.⁵⁴¹

IV. ACHIEVING OUTCOME EQUALITY: IMPACTS AND TECHNICAL CHALLENGES

Based on a rule-objective standard for equal treatment, there seems to be good reason for e-books to be treated as print books. We must now turn to consider how this can be achieved by looking at any impacts of e-books on the rule function that may impede outcome equality if they are not neutralised in some way. The first is that the e-book supply chain is more externalised; the benefits of the reduced rates may not filter through to cultural production as intended under the original scheme, but rather to technical production e.g. by subsidising e-reader uptake. Secondly, the fact that an 'e-book' can be many things and is not so easy to define as a printed book means that certain access models or format restrictions may be better excluded from the definition so as to bring the policy in line with printed books.

I. The more externalised the supply chain, the greater the displacement of general interest benefits

A core part of the objective of VAT reduction is to produce benefits throughout the supply chain - the increased spending of consumers in turn increases profits of industry players and allows for greater investment in stock, service or taking risks on new authors. The problem is that for each of these elements to play its role and for the benefits to filter through to society in general, the system must be relatively internalised; national policymakers aim at fostering their national publishing markets; the increase in sales because of the reduced rate must result in an increase in turnover for industry players.

The logic of reduced rates is based on assumptions about the print supply chain, where purchases are generally national: if a German consumer buys a physical book printed by a UK publisher in the UK, he pays UK tax. Or if he buys it in Luxembourg he pays Luxembourg tax. For distance sales of physical books, the VAT is always calculated on the basis of the customer's place of residence: If a German customer buys a UK publisher's print book from Amazon (LU), he pays VAT in Germany. Until 1st January 2015, this was not the case for electronic services: German consumer buying a UK publisher's e-book through Amazon (LU) pays tax to Luxembourg currently, or will from 2015 pay VAT in Germany.

⁵⁴¹ Council of the European Union (2012), 'Conclusions on the Future of VAT of the 3167th Economic and Financial Affairs Council Meeting', Brussels, 15.05.2012, p. 3.

Under the pre-2015 place of supply rules for ESS, countries that have decided to provide for a reduced rate are not necessarily increasing the accessibility of books for their own citizens alone, but also for any consumer who purchases an e-book from a company based in their jurisdiction. Under the PoS rules, the equity effects of applying reduced rates to downloadable e-books are therefore much more dispersed than for physical books where the place of taxation is the country in which the consumer is based: the consumer only benefits from a reduced rate if his or her government has made a choice in this regard. As has been noted, this current system is the source of the Commission's competition concerns with France and Luxembourg's unilateral lowering of their rates. From 1st of January 2015, the country of destination principle has applied to electronically supplied services; this means that the distortions of competition brought about by 'VAT havens' will be removed because sales by both foreign and national vendors will both be subject to the same rate.

The change to PoD taxation also has the effect of re-directing VAT collected back to the MS in which the product is consumed and in which the consumer is established. If reduced VAT does indeed increase reading and the filter through benefits this brings, these will flow into the purse of the correct MS for re-distribution. Consumers will only benefit from reduced rates if their governments have chosen that they should so benefit; they will no longer be able to benefit from a choice of the Government of Luxembourg or France, or otherwise.

The filter-through benefits are displaced significantly using the PoS rules, but also to a lesser extent using the PoD rules even where this concerns physical sales if the publisher, retailer and consumer are not based in the same state. As a result of the growing use of the Internet and the more dispersed sales opportunities it can bring, and the benefits of reduced rates cannot be as effective at achieving the general interest goals (i.e. contributing to more books and more accessibility) as they were for print books sold through more 'traditional' supply chains.

2. *Hardware's place in the supply chain?*

As has been noted, a secondary purpose of reducing VAT is to 'count back' benefits of the reduction in prices for end consumers through the supply chain to 'wholesalers, distributors, publishers, printers and other companies in the graphic arts (binding, artwork), authors and other contributors to the content and its shaping'.⁵⁴² Plainly, not all of these actors have a role to play in the e-book market. Instead, we find that hardware producers enter the picture as potential beneficiaries of reduced rates,

⁵⁴² Rouet, 'VAT and Book Policy : Impacts and Issues' (1999), p. 34.

although due to the multi-function nature of some devices these manufacturers may not be strictly part of the e-book supply chain.

That the supply chain evolves is a necessary part of all technological progress. The point is, as evidenced from the reasoning of France underlined above that welcomes stimulation of the hardware market is a recognition of this. The difficulty is however that with converging media and a shift in the market towards tablet devices rather than dedicated e-readers that this benefit will not be put back into the publishing supply chain: while printers and binders had one core output, hardware developers may prefer to focus any profit increases into developing multimedia rather than simple reading capacity, detracting from the overall appeal of books to users of these devices. Although this impact of the supply chain changes is unfortunately feasible, it is not certain. It would seem that the only way to ensure that the reduced rates do bring the efficiency benefits to the publishing supply chain and not to other markets would be to provide that the reduced rate only be applied to e-books sold for use on dedicated e-reader devices. Such a possibility is firstly very technically difficult – the various formats described in Chapter 2 are provided for use across a variety of devices and consumers can read a single title they have purchased switching between any mix of tablet, mobile, desktop and e-reader devices with relative ease. Secondly, limiting the benefits of reduced rates in this way would limit the benefit to a narrow segment of readers, which itself goes against the desired objectives of the ‘subsidy’.

3. *Defining an e-book subject to reduced VAT*

Following on from the above, achieving outcome equality could come down to definitions not only regarding the hardware on which they can be read, but also because e-books can contain multimedia features. Strict delineations between different content formats become difficult where e-books contain sound, film, pictures *and* text. Such multimedia e-books are made available to consumers alongside or alternatively to ‘facsimile edition’ digitised books.⁵⁴³ However, as hybrid media, where do we draw the line between e-books subject to reduced rates and learning games with clear storylines built in? In this respect, the Commission’s Digital Agenda notes that:

“Public authorities should play their part in promoting markets for online content. The challenges of convergence should be addressed in all reviews of public policy, including tax matters.”

⁵⁴³ H Jenkins, *Convergence Culture : Where Old and New Media Collide* (New York: New York University Press 2006); F Marty, ‘Convergence numérique et Risques de Forclusion des Marchés : Quel Partage des Rôles Entre Politiques de Concurrence et Régulation Sectorielle ?’ (2011) N° 3-2011 Revue des droits de la concurrence.

The question is then for governments to decide whether they wish to stimulate read-only access, or also more multimedia activities, and how this aligns with neutrality. By way of example, we can note that the French VAT law limits e-books that can be subject to reduced rates to those that do *not* include such multimedia elements.⁵⁴⁴ This is in contrast to the approach taken for the purposes of applying a FBP, where ‘additions of text or data belonging to different genres, including sounds, music, pictures or movies, limited in number and importance, complementary to the book and designed to facilitate its understanding’ do not interfere with the application of the law.⁵⁴⁵ In Luxembourg, the definition of an e-book for VAT purposes remains unstated: their law applies to ‘books’ – and e-books⁵⁴⁶ – without further definition, based on the principle of neutrality.

Further it can be noted that this definitional aspect is particularly important in certain sectors such as children’s books and reference works where multimedia features have high potential, but is likely to be less problematic in the general fiction segment of the market. In none of the VAT laws of the MS are a particular category of books excluded, save references to works that are offensive to minors. While drawing the line between levels of media integration is much more difficult in practice, excluding whole segments of the market is also undesirable as these segments are of high educational value.

Lastly on this definitional issue, there is a point of difference between physical and e-books that came to be discussed in the French National Assembly subsequent to the extension of reduced rates to e-books: E-books can contain DRM protection to limit access (and therefore their capacity to disseminate culture) while physical books are unrestricted. Discussions took place particularly regarding the extent to which e-books containing technological protection measures could be considered comparable to non-DRM protected e-books, although in the end this amendment was not adopted as has been noted in Chapter 2 Section IV.2.b.

V. CONCLUSION

⁵⁴⁴ “The book, whether digital or on a physical support, has as its object the reproduction and representation of an intellectual work created by one or more authors, consisting of graphical elements (texts, illustrations, drawings) published under a title.

The digital book only differs from the printed book by way of certain necessary elements inherent in its format. Typographical and composition variations, as well as the modalities of accessing the text and illustrations (associated search engine, ways of browsing or scrolling through content are considered as accessory elements that are specific to the digital book.

The digital book is made available on a public online communication network, notably by download or streaming, or on a removable storage device.” Definition Fiscale du Livre (2005).

⁵⁴⁵ France - E-Book Definition Decree (2011).

⁵⁴⁶ Luxembourg - Curculaire on e-book VAT (2011).

As noted above, there are two problems with the current VAT Directive that cause problems for MS wishing to extend the reduced rates they apply to print books also to e-books: Firstly, e-books are ESS and are thereby blocked by Article 98(2) from being subject to reduced rates, secondly Annex III specifies that books must be on a 'physical means of support' to benefit from reduced rates. The rulings of the CJEU *Commission v France* and *Commission v Luxembourg* have confirmed that the combination of these provisions blocks MS from applying reduced rates of VAT to e-books. If change is to come, it must now be from the EU legislature and this will likely be in the form of the Commission's proposals for a revision of the Directive, foreseen for 2016.

Perhaps the most surprising aspect the e-book VAT debate is the lack of debate; there is an almost suspicious amount of agreement between MS and market players about the need for equalisation. Equalisation would indeed also seem to be in line with our rule-objective analysis. Thus at the EU level the framework needs to be opened to allow for this possibility, although the allocation of the core objectives and their translation capacity would fall to the MS to decide based on the particularities of their individual policies.

It seems more than likely that once proposals are on the table to extend the category of 'books... on all physical means of support' then these will go through the required legislative hoops without difficulty, at least based on the broad consensus we are now seeing. As far as amendments go, the wisest option would be for the requirement of a 'physical means of support' in Annex III to simply be removed and an exception made for e-books as ESS rather than incorporating a strict definition of an e-book into the Directive itself.⁵⁴⁷ It would then be for the MS to determine within the newly broadened category that they wish to apply the reduced rate after carrying out a rule-objective analysis to see if their specific objectives translate.

Here however we come to a point of conflict. While the legislative levels have been neglectful in the sense that they have talked of equality but not concretised this into anything that resembles a framework with a particular standard, the CJEU has repeatedly made decision within the VAT context on the basis of comparable consumer use. Thus, even if the MS finds that our rule objective approach necessitates equalisation then the court may come to a different conclusion if questions on the matter come

⁵⁴⁷ On the dangers of forgetting to future-proof, see Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010). However, note that the Commission is likely to be reluctant to proposed an amendment that would open point 6 of Annex III too much; it is only because of their limited scope that reduced rates are 'permitted' despite going against the bigger picture of the EU harmonisation project.

before it. To avoid equalisation being overruled by the Court, the MS choice would have to withstand the Court's test for fiscal neutrality also, that is all goods and services considered to be comparable from the point of view of the average consumer should be subject to the same rates.⁵⁴⁸ This may of course mean that by a rule-objective standard equalisation is necessary, but e-books and print books are not to be treated the same in the end because consumers do not view them as so. Such a situation would clearly be unsatisfactory; if the VAT Directive was opened up with the specific legislative intent of allowing equalisation to then be blocked by the current application of fiscal neutrality, the possibility of extension to e-books might remain elusive as ever.

The present author has certain qualms about the implications of using a consumer based test where evolving technologies are concerned, as have been voiced in Chapter 3. Here we can make two remarks about this potentially contradictory situation. Firstly, even if the CJEU continues to rely on consumer use for fiscal neutrality it might still be wise to push ahead with amendments to the legal framework, this being in line with our equality analysis. However, MS would need to have the consumer use standard in mind when deciding whether they make use of the *option* to apply reduced rates to e-books as well as print books; Even if consumers in their country might not see the two as comparable now (this is especially likely to be the case in countries where e-book penetration is low), they may well do so in future thereby allowing for the extension to be used, although judging exactly when this is the case by equality as remains ever problematic.

Secondly, and more forcefully, there is a strong argument for a unified standard to be used to ensure consistency: If the legislature were to amend the VAT Directive driven by our rule-objective standard and then it is blocked from implementing the equality mandated by that standard because the CJEU prefers the consumer perspective then there is little to be gained from asserting that our framework should apply in the first place. This tells us something that perhaps sounds self-evident but is nonetheless worth stating: If different standards are used for judging likeness and difference then contradictions between the levels applying the decisions may result. This could be the case between legislatures and Courts making decisions, or between the EU and national levels. Here then, through our case study concerning decisions at both the EU and national levels, as well as envisaging applications by the Court and the legislature, we have come to underline the importance of applying a consistent and known standard for equality.

⁵⁴⁸ See the discussion in Chapter 3.III.2 .

CHAPTER 7: FIXED PRICING FOR E-BOOKS

INTRODUCTION

Previous literature has noted that ‘Cultural policies are horses for courses and not one size fits all.’⁵⁴⁹ This is most certainly true in the context of fixed pricing.

As should be clear by this point, this thesis does not seek to endorse a view of whether or not FBP is ‘good’ or ‘bad’ for cultural production, but instead to analyse whether based on a rule-objective standard for equality FBP laws should be applied to e-books where they are in place for print books.

This chapter is structured slightly differently from the previous two insofar as it does not contain a section outlining current debates and stances on FBP for e-books. The reason for this is twofold: Firstly, as Chapter IV has made clear FBP is very much a national policy choice, and any EU level comments on this are implicit rather than explicitly given. Unlike copyright and VAT where there is a EU framework in place, no such framework exists at the EU level for FBP; rather the status quo has developed through negative integration entailing a balancing exercise by the EU Courts to resolve the horizontal conflict of norms that arises between national cultural policies and EU law.⁵⁵⁰ Some indications of the Commission’s own attitude to national fixed e-book pricing and the change in the balance that the digital environment entails have been given in the context of the French 2011 e-book Law and are laid out as they arise in the context of this chapter. Secondly, as each MS studied has chosen a different approach to e-books, for clarity specific debates taking place within those states are considered in the legal framework and objectives sections. Section II looks at the most cited objectives of FBP and their translation capacity into the e-book context, drawing heavily on the debates that took place in the French National Assembly and Senate in the run up to the adoption of their 2011 e-book pricing law. Section III moves straight into the impacts of e-books and the difficulties these bring for achieving outcome equality.

Before commencing, it is appropriate to say a word on the agency model debacle that shot the term ‘fixed e-book pricing’ to the limelight in 2010. The ‘agency model’ adopted by 5 publishers and the e-book retailer Apple is not fixed pricing in the sense of the national laws examined in this Chapter, but it is very close to the book pricing

⁵⁴⁹ Appelmann and Canoy, ‘Horses for Courses – Why Europe Should Not Harmonise Its Book Policies’ (2002).

⁵⁵⁰ Schmid, ‘Diagonal Competence Conflicts between European Competition Law and National Law - the Example of Book Price Fixing’ (2000), in particular at pp. 161-163.

agreements that were common between publishers and retailers in the 1990s and previously (before these were transformed into laws, as has been noted in Chapter IV of this work). The agency model involved individual vertical agreements⁵⁵¹ between publishers and distributors of e-books, giving the publisher control of the retail price paid by end consumers. In these agreements, publishers act as the principal and retailers as the agent.⁵⁵² The retailers still sell to consumers, but they are intermediary actors remunerated on the basis of commission per sale.⁵⁵³ The most often cited aim of the agency model was to remove possibilities for retailer discounting in order to ensure a diversity of retail outlets; in essence, these are the same motives behind FBP by law. However, for both the Commission and DoJ investigations it was the (allegedly) collusive way that the agreements were made that was central to the investigations, not the objectives of the agreements themselves. This means that in the context of this thesis the outcomes were of little value other than to draw attention to the model and the issue of book pricing control.⁵⁵⁴

What can be said is that agency agreements – concluded without horizontal collusion of course – are still being used throughout the industry and are the preferred model of publishers as well as many retailers. One of the most surprising developments in this respect is that Amazon – which had spoken out strongly against the idea of publisher set pricing – has now concluded agency agreements with at least three of the publishers involved in the saga, Hachette, Macmillan and Simon & Schuster.⁵⁵⁵ In the new contracts,

⁵⁵¹ Although individual, the DoJ Complaint states that Apple used standard-form contracts with identical provisions. See US Department of Justice (2012), ‘Complaint, United States v. Apple, Inc.’, 2012 WL 3865135 (S.D.N.Y. Sept. 5, 2012) (12 Civ. 2826 DLC). <<http://www.justice.gov/atr/cases/f282100/282135.pdf>>, accessed 28.03.2014. In particular at 36 referring to the identical terms of the agreements entered into and paras.38 and 74 indicating the tight timeframe of the move to agency.

⁵⁵² Although called the ‘agency model’, it cannot be taken for granted that these are true agency contracts.

⁵⁵³ In the Apple e-book agency situation, retailers as ‘agents’, receive a 30% commission from each eBook they sell, with the remaining 70% going to publishers. This 70/30 ratio is used in the Apple agency contracts as well as in its ‘App store’. Platform sellers such as eBay and Amazon take between 7-11% and 6-25% respectively for providing an online ‘storefront’ for smaller retailers. However, it should be noted that the 30% fee is thought to have been adopted by other retailers than Apple for e-books.

⁵⁵⁴ After an eight month investigation, on 12th August 2012, the Commission adopted its preliminary assessment that four of the publishers and Apple had, “by jointly switching the sale of e-books from a wholesale model to an agency model with the same key terms on a global basis... engaged in a concerted practice with the object of raising retail prices of e-books in the EEA or preventing the emergence of lower prices in the EEA for e-books, in breach of Article 101 of the TFEU and Article 53 of the EEA Agreement”. Like the European Commission, the qualms of Judge Denise Cote were with the ‘conspiracy’ to restrain trade rather than the use of agency agreements themselves to sell e-books. COMP/AT.39847 - *E-Books Decision Addressed to Hachette Livre SA, Harper Collins Publishers Limited, Harper Collins Publishers, L.L.C., Georg Von Holtzbrinck GmbH & Co. Kg, Verlagsgruppe Georg Von Holtzbrinck GmbH, Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc. And Apple, Inc.* European Commission (2013), ‘Final Report of the Hearing Officer’, Comp/39.847, Final Report of the Hearing Officer, 2013/C 73/06. Opinion & Order of Judge Denise Cote *Joined Cases United States of America v Apple Inc., et al., and the State of Texas, et al., v Penguin Group (USA) Inc., et al.*, [2013] 12 Civ.2826 (DLC) and 12 Civ. 3394 (DLC); United States District Court (Northern District of California) *Anthony Petry and Marcus Mathis Individually and on Behalf of All Others Similarly Situated v. Apple Inc; Hachette Book Group; Harpercollins Publishers Inc; Macmillan Publishers Inc; Penguin Group (USA) Inc; Simon and Schuster Inc* [2011].

⁵⁵⁵ R Bellis (2014), ‘Back to Agency Ebook Pricing at Simon & Schuster’ (Digital Book World blog), posted 21.10.2014. <<http://www.digitalbookworld.com/2014/back-to-agency-ebook-pricing-at-simon-schuster/>>

it is the publisher that sets the price at which Amazon will sell its books and the retailer has only limited scope for discounting.⁵⁵⁶

The legacy of the agency saga therefore seems to be that, so long as there is no horizontal collusion involved, agency has emerged as a valid e-book distribution model, and one that seems to find acceptance by publishers and retailers alike.

I. THE LEGAL FRAMEWORK

The purpose of this section is to look more closely at how FBP systems function and highlight some of their provisions. This section will focus firstly on the rules as they have been set up for print books, focussing on Austria, France, Germany and Netherlands. As will become clear, the foundations of all these systems are very similar to one another in the traditional book context.

By understanding how things work in the print context, we then have the groundwork to examine more closely the difficulties moving these to an intangible environment present. When it comes to e-books, divergent approaches have been taken leading to very different legal frameworks for State. France chose to enact new law specifically for e-books, with the intention of replicating the outcome of the loi Lang in the intangible context. Germany instead subsumed e-books within the definition of a 'book' in its Buchpreisbindungsgesetz (BuchPrG). Similarly, Austria chose to apply its print law and formalised this arrangement by amending the law in December 2014. Different again is the situation of the Netherlands, where the Dutch government decided not to extent its print FBP law to e-books.

1. *Fixed book pricing laws*

All national fixed book pricing laws can be generalised insofar as they provide that publishers and importers are required to provide a *minimum* price for each title, which must be applied by retailers. Since the price set is a minimum price only, *fixed* book pricing may be something of a misnomer; further, it should be highlighted that such schemes allow inter-brand competition because the price per title varies, but no intra-brand price competition between retailers for the same title.

accessed 12.12.2014; H Ellis-Petersen, 'Amazon and Publisher Hachette End Dispute over Online Book Sales', The Guardian (Online edition), London published online 13.11.2014. Available at: <http://www.theguardian.com/books/2014/nov/13/amazon-hachette-end-dispute-ebooks>, 12.12.2014; J Sargent (2015), 'A Message from John Sargent' (Tor.com blog), posted 18.12.2014. <<http://www.tor.com/blogs/2014/12/a-message-from-john-sargent>> accessed 12.01.2015.

⁵⁵⁶ L Hazard Owen (2014), 'In Amazon/Hachette Deal, Ebook Agency Pricing Is a Winner' (Gigaom blog), posted 14.11.2014. <<https://gigaom.com/2014/11/14/in-amazonhachette-deal-ebook-agency-pricing-is-a-winner/>> accessed 12.12.2014. It is unclear whether the new contracts contain the disputed 'most favoured nation' clauses that were contained in the agreements with Apple.

Where a MS has chosen to provide for fixed pricing, all the laws of the MS provide for the following elements:

- Provision that the *publisher must fix the price* for the book;
- Provision that retailers are bound by this fixed price;
- Provisions relating to the *duration* of the fixed price, *scope* of the fixed price and possibilities for *discounting* within the fixed price;
- Provision relating to the treatment of *imports* and, in accordance with EU case law, an exception to these provisions allowing for variations from the publisher fixed price in the case of *EU/EEA imports*. In all laws examined, this includes incorporation of a ‘circumvention rule’.

In the following sections, ‘imports’ refers to books imported from another State (MS 1) and then sold in a second State (MS 2). ‘Re-imported books’ are books published in State, exported to another and then re-imported for sale in the originating State. The ‘import’ refers to the activity of the reseller rather than a situation whereby a consumer goes abroad, purchases a book in a bricks and mortar store and brings it home, or makes a purchase through a website operating from another MS. ‘Cross-border sales’ referred to in this section always involve two States in the retail transaction: the consumer is based in one State and the retailer in another.

It should be noted that FBP laws only bind retailers within the national territory; for example, Belgian or British retailers cannot be stopped by the loi Lang from selling print books at below the fixed price to French customers. This is worth reiterating because it is a major point of contrast – and controversy – between the French loi Lang applying to print books and the digital book law, as will be examined in the next section.

a. Scope of FBP laws

National fixed pricing laws are not all encompassing; they apply only to publications coming within their scope, and may not apply in the first place if a book does not meet the criteria for application of the law.⁵⁵⁷

This point is particularly important when we come to consider the applicability of national laws to ‘non-national works’. The application of the law may be based on the location of publication (as in France) or on the language of the publication, regardless of location (e.g. Austria (German language), Germany (German language, although foreign

⁵⁵⁷ It is worthy of note that several national FBP laws also include e.g. musical scored within their scope, but commonly exclude e.g. calendars, blank notebooks.

language books are also included if intended for sale ‘mainly in Germany’) and the Netherlands (Dutch or Frisian language))⁵⁵⁸.

In addition, the application of the price fixed by the publisher is usually limited in duration; they will only apply to publications within a certain time period from the publication of that edition. In France and Austria, the laws cease to control the retail price for editions over 2 years old where the book was last supplied over 6 months previously.⁵⁵⁹ In Germany, this period is 18 months, and there is an additional requirement that the publishers must announce that they are lifting the fixed price.⁵⁶⁰

Further, fixed book pricing laws do leave varying degrees of latitude for discounting. In France, the *loi Lang* provides that the retailers can apply a discount of up to 5%, while in the Netherlands this can be up to 10%. Such provision is not replicated in Austria and Germany, although discounts are permitted for use in libraries and schools. Bulk discounting is also permitted; for example in Germany a reduction can be given where more than one copy of the same book is bought or where a transaction involves a series of books.⁵⁶¹

b. Application to of FBP laws to imports

Although the differences listed thus far affect the way in which the fixed pricing system operates within a single Member State, by far the most important aspect of the functioning of these laws from the perspective of the European Union is the way these relate to imports. In the FBP case law that has already come before the CJEU (examined in detail in Chapter IV), it was the provisions on the treatment of imported books that caused the most difficulty from an EU law perspective. Through a process of *ad hoc* but direct top-down intervention (negative integration), national laws have come to read similarly, curtailed by the rulings of the European Court.

For example, Article 1 of the original French *loi Lang* provided that where a work was imported from abroad, the importer rather than the publisher (as would be the case for books published in France) was bound to fix the retail price: In *Leclerc v Au Blé Vert*⁵⁶², the CJEU found this to be inconsistent with the free movement provisions, amounting

⁵⁵⁸ Austrian law: Article 1; German law: Articles 2.1 and 2.2 ; Dutch law: Article 1(b). A simple explanation for the German and Austrian preference for language rather than location can be found in the history of agreements in these countries, which originally took the form of a ‘DreiLänderRevers’ system C-531/07 *Libro*.

⁵⁵⁹ Austria Section 5.3, France Article 5.

⁵⁶⁰ Section 8.1. Sich notes that in practice most German publishers retain the fixed price for much longer: Sich, ‘The System of Fixed Book Prices in Germany’ (2004), p. 9.

⁵⁶¹ BuchPrG Section 5(4), *ibid*.

⁵⁶² Case 229/83 *Leclerc*.

to a restriction on imports. Thus, as a result of this case the law was amended to contain provisions excluding EU/EEA imports from the requirement that the importer fixes a price, unless the books have been exported and then re-imported with the sole intention to circumventing that price. If this ‘circumvention rule’ applies or if the imports are from outside the EU/EEA then the importer is obliged to sell to the public at a price that is at least equal to that set by the publisher.

In the most recent FBP case to come before the Court – *Libro*⁵⁶³ – the CJEU found that Austrian legislation obliging importers to fix a price at least equal to that set by the publisher in the country of origin was contrary to EU law. The legislation meant that, e.g. where a German book was imported for sale in Austria the importer was obliged to sell it at *least* the German publisher set price. This meant that importers were at a disadvantage because they could not price according to the conditions of the Austrian market, whereas Austrian publishers were able to do this.

The legislator amended the law accordingly and the German and Austrian laws are now similar. Where the publisher has set a price for the country of import, the importer must not sell for less than this price. Where no price is set, the price fixed for the country of origin applies with the relevant VAT of the country of import added. However, if the importer has purchased books at below the publisher’s fixed price in the country of publication, the sale price in the country of importation may be reduced by the ‘ratio equivalent to the ratio between the earned commercial advantage to the normal cost prices in the country of purchase’.⁵⁶⁴ This ensures that competitively priced stock purchases made by importers can be passed on to consumers. The French and Dutch laws do not contain equivalent provisions to this effect, providing only that the conditions for importers – fix a price at least equal to that set by the publisher – do not apply to imports from within the EU/EEA.

c. Application of FBP laws to cross-border sales

Most FBP laws do not contain explicit provision on their application to ‘cross-border’ sales, i.e. sales where consumers in a MS with a FBP purchase their books from a retailer based in another country. The reason for this is rather self-explanatory; in the traditional contents most consumers wishing to purchase from a foreign-based store would have had

⁵⁶³ C-531/07 *Libro*.

⁵⁶⁴ German 5(3), Austrian 3(3).

to have travelled to that country to buy the book they wanted.⁵⁶⁵ In this circumstance, the law of the MS where the purchase was made would prevail.

The Internet has nonetheless facilitated the possibility for consumers to access markets outside their own. Where consumers navigate to websites of retailers located elsewhere, their purchases are not covered by the FBP law of their own state. The possibility for consumers to shop abroad has therefore increased with the Internet, although often technical measures are put in place blocking purchases from abroad by necessitating the use of a credit card with an address in a certain country or a delivery address in that country.⁵⁶⁶ Such approaches are used because it is beneficial for businesses to price differentiate between markets; they are not the result of legal blockages although they may be the result of practical ones (e.g. inability of small businesses to process payments from abroad, high transaction costs).

The only FBP law that mentioned cross-border e-commerce transactions specifically was the Austrian one, which until December 2014 provided that the law applied ‘with the exception of cross-border electronic commerce’, meaning that books sold to consumers in say Germany via the Internet would not be subject to the Austrian fixed price. Although this provision was not directed towards the e-book scenario, since December 2014, the law has included e-books specifically but no longer contains a reference to cross-border e-commerce.

2. *Fixed e-book pricing*

Having set out the physical book situation, it is now relevant to consider how FBP is being applied to e-books, if at all. This section complements Section III.2 in Chapter 2 of this thesis, which has looked at some of these laws already with a view to pinpointing the definitions they use for e-books definitions. Here, the focus is on the framework in place and in the next section any prevalent justifications for these decisions will be examined. It is worth noting that in none of the countries which have adopted e-FBP is the e-book price connected to the print book price set by the publisher; as such, a publisher may assign an e-book a price of more or less than the print version. It can also be noted that in countries where FBP is *not* in place, neither has e-FBP by law found a foothold. Nonetheless, it is interesting to observe that in countries such as the UK (and the US) where no FBP exists, the agency model has strong support. This is something of a kick-back to the net book agreement days, although unlike the NBAs the Government

⁵⁶⁵ To a certain extent, mail-order purchasing may have been possible for some consumers although the difficulties of providing payment prior to the Euro currency and the lack of publicity of non-national outlets would have provided natural deterrents for such purchasing behaviour.

⁵⁶⁶ See Chapter IV, section 3.b.

has not given any indication that it supports such an approach.

In the Netherlands the conclusion was reached that the extension of the FBP law to e-books was premature: As such, print books are covered by the law while e-books are not. The reasons for this decision are important for Section IV below as it was because of the impacts of e-books and the differences in their functioning as compared to print books that the Dutch legislator choose not to apply an equivalent law.

In both Germany and Austria the existing law applies for both print and e-books. In Austria, this is because the law was updated in December 2014 to categorically include e-books (and removing the exclusion of e-commerce); in contrast, Germany did not amend its legal framework but has rather ‘subsumed’ e-books within the scope of the existing BuchPrG which covers also ‘products which reproduce or substitute books.’ Both these approaches have been justified on the basis for a continuing need to protect the production of and access to book *content*; the same need to safeguard the industry is felt in both countries. Regarding the functioning of the laws the same provisions apply for print and e-books.

The most interesting country example here is that of France. On the 26th May 2011, Loi n° 2011-590 on the price of digital books was unanimously adopted.⁵⁶⁷ This instrument, separate from the loi Lang, was essentially intended to implement its provisions in the digital environment.

Under the first draft of the law, Article 2 obliged all French publishers to fix a retail price for the books they publish while Article 3, required all French retailers to apply this price. These provisions were in essence the same as those to be found in the loi Lang. However, by the second draft of the law, coming from the Senate, Article 2 was widened in scope so that *all* publishers, regardless of whether they were established in France or not, must fix a price for eBooks they publish for commercial sale in France (i.e. all publishers worldwide must set a fixed price for any eBook they wish to be sold on the French market). In this second draft Article 3 has also been enlarged significantly to specify that all retailers, again regardless of their place of establishment, would be bound to apply the fixed price whenever they sell to buyers located in France.

In the final enacted version of the law, the scope of Article 3 means that all retailers – French established as well as those outside of France – are obliged to apply the law when selling to French consumers (or, more correctly, consumers based in France. Article 2

⁵⁶⁷ LOI n° 2011-590 du 26 mai 2011 relative au prix du livre numérique, JORF n°0124 du 28 mai 2011 p.9234.

was however limited again to cover only publishers established in France who publish eBooks for commercial distribution in France. The combination of Articles 2 and 3 in the final law thus mean that the law only applies: (1) if the eBook publisher is established in France; (2) If the eBook is intended for sale on the French market (i.e. is a French market edition); and (3) if the eBook is sold to a buyer in France. Conversely, the law will not apply (i.e. pricing control will remain with the retailer) if: the consumer is outside of France; if the eBook is a French-market editions but published by a non-French publishers; if the eBook is not intended for the French market (e.g. is for sale in Belgium, Canada, etc). A further important limit to the law is provided in decree No.2011-1499 which provides that the law only applies when either the books is available in both print and electronic form (i.e. a 'facsimile eBook') or when the 'content and composition [are] printable without its accessories'⁵⁶⁸. Although the limits of this definition are still to be tested, it seems that this would mean that publishers⁵⁶⁹ wishing to get around the law and have their books subject to normal competitive conditions could include some 'interactive' element thereby bringing them outwith its scope.

The main problem with this law is that, as will be discussed in detail below, the law can be seen to have extraterritorial effect, something which print fixed book pricing laws do not have. This is despite concerns expressed by both the European Commission and, motivated by these concerns, the National Assembly, that the law is not in compliance with European law. Despite these problems, it was due to the impacts of e-books on the functioning of the law that the French legislator saw fit to add in such a provision so that the effect would be to gain equivalent coverage as the print law.

II. EQUAL TREATMENT ANALYSIS

I. *The objective of FBP*

There exists an expansive body of literature on the subject of fixed pricing in the publishing sector, often underlining the need for an 'orderly market'.⁵⁷⁰ This either tends to focus on single language areas,⁵⁷¹ on their complex relationship with EU law,⁵⁷² on the

⁵⁶⁸ Décret n° 2011-1499 du 10 novembre 2011 pris en application de la loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique P Le More, 'The Legal Framework for E-Books in France' (2012) 1 (Special Issue on electronic books) International Business Law Journal, p. 372.

⁵⁶⁹ Most likely foreign publishers, considering that French publishers involved in the legislative process approved of the adoption.

⁵⁷⁰ G Graham, *As I Was Saying: Essays on the International Book Business* (London: Hans Zell Publishers 1994), p. 54.

⁵⁷¹ For example, on the French system: H Gaymard, *Pour le Livre : Rapport sur L'économie du Livre et Son Avenir* (Paris: Gallimard – La Documentation Française 2009); Galmot and Biancarelli, 'Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire' (1985). Under the German system: Sich, 'The System of Fixed Book Prices in Germany' (2004); Bittlingmayer, 'Resale Price Maintenance in the Book Trade with an Application to Germany' (1988); Everling, *Book Price Fixing in the German Language Area and European Community Law (Buchpreisbindung Im Deutschen Sprachraum Und*

controversial political surrounds of fixed book pricing⁵⁷³ or on their even more controversial economics.⁵⁷⁴ The purpose of this section is to look more generally at the multi-fold objectives of FBP that resonate throughout all countries in the EU when looking at the reasons for adopting such a system. It can be noted however that the evident problem with FBP is that for its objectives to be achieved, publishers and booksellers must act in a certain way; they must indeed take risks that they otherwise would not and publish diversified works that are not all going to come out on top of the bestseller list. One may therefore question how we might go about monitoring this. Indeed, part of the problem with FBP is that “Governments fail to set (quantitative) objectives for the fixed book price agreement, which makes it difficult to evaluate its success and contributes to it being treated as dogma in the book world and the political arena.”⁵⁷⁵

In keeping with the principle of subsidiarity, which is so important in this national cultural policy field, the purpose of this section is not however to judge the ability of FBP to actually meet its objectives, but rather to find out what these objective are because – under our rule-objective framework for equal treatment – it is these objectives that should for the starting point for deciding if e-books should be treated like print books.

Europäisches Gemeinschaftsrecht) (1997). On the UK Net Book Agreements: Or on the Dutch agreements (before the adoption of a law) Christine E Zandvliet, ‘Note: Fixed Book Prices in the Netherlands and the European Union: A Challenge for Community Competition Law’ (1996-1997) 3 *Columbia Journal of European Law*.

⁵⁷² D Ferri, ‘Cultural Diversity ‘under Review’ - the Fachverband der buch- Und Medienwirtschaft Case’ (2010) 11 (4) *European Journal of Law Reform*. ; PJ Kuyper, ‘Commentary: Case 229/83, Association des Centres Distributeurs Edouard Leclerc, Paris and Thouars Distribution & Autres S.A., Sainte Verge, v. “Au Ble’ Vert” S.A.R.L., Thouars et al. Preliminary Ruling of 10 January 1985 Requested by the Court of Appeal (Cour D’appel) Poitiers.’ (1985) 22 *Common Market Law Review*. ; Schmid, ‘Diagonal Competence Conflicts between European Competition Law and National Law - the Example of Book Price Fixing’ (2000); G Monti, *EC Competition Law* (Law in Context., Cambridge: Cambridge University Press 2007).

⁵⁷³ Appelman and Canoy, ‘Horses for Courses – Why Europe Should Not Harmonise Its Book Policies’ (2002); D Stockmann, ‘Free or Fixed Prices on Books - Patterns of Book Pricing in Europe’ (2004) 11 (4) *Javnost - The Public*. ; M Bennett, Fletcher, A., Giovannetti, E. And Stallibrass, D. (Bennett et al), ‘Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy’ (2011) 33 (4) *Fordham International Law Journal*. ; A Littoz-Monnet, ‘The European Politics of Book Pricing’ (2005) 28 (1) *West European Politics*.

⁵⁷⁴ F Fishwick, ‘Book Prices in the UK since the End of Resale Price Maintenance’ (2008) 15 (3) *International Journal of the Economics of Business*. ; J Beck, *Fixed, Focal, Fair? : Book Prices under Optional Resale Price Maintenance* (Berlin: WZB 2004); F Van Der Ploeg, ‘Beyond the Dogma of the Fixed Book Price Agreement’ (2004) 28 *Journal of Cultural Economics*. ; M Canoy, JC Van Ours *et al.*, ‘The Economics of Books’, in Victor A. Ginsburgh and David Throsby (Ed.), *Handbook of the Economics of Art and Culture* (Volume 1; Elsevier B.V. 2006).

⁵⁷⁵ Van Der Ploeg, ‘Beyond the Dogma of the Fixed Book Price Agreement’ (2004), p. 1.

FBP purports to work by levelling the playing field downstream as it eliminates price competition between large and small, city and country booksellers.⁵⁷⁶ Without price to take into consideration, service and convenience (locational but also ease of access) are the factors upon which booksellers compete. FBP also keeps retail margins artificially higher and more stable than would be the case under situations of price competition. With higher retail margins, books are more appealing for booksellers to stock and with more booksellers stocking and promoting books, more consumers are likely to buy them. The stability it gives to margins is also important because when these are known, publishers and booksellers can offset their risk. They can less hesitantly choose to publish or stock a less-known title because of the known margins on bestsellers. This argument also applies to publishers' decisions to publish new content: Although the publishing game always inevitably carries a degree of risk, the argument is that FBP assures margins and creates a less risk-averse marketplace that enhances content plurality. For better or for worse (and depending on your fondness for cylindrical shaped pasta) the German Book Publishers Association has been smug about the results:

“Due to fixed book prices, we Germans have 25 spaghetti cookbooks, and you poor Americans only have three.”⁵⁷⁷

FBP keeps prices of some titles – principally bestsellers, which would normally be the subject of toughest price competition and therefore lowest prices – artificially high.⁵⁷⁸ This artificially higher price is considered justified because it enables less profitable works to be priced lower than would otherwise be the case, making them more appealing. The argument goes that although prices for some individual titles may be raised under FBP, overall average prices go down or, at the very least, stabilise in the middle, which

⁵⁷⁶ This is perhaps the least disputed objective of FBP: Ringstad and Fishwick both find that no fixed pricing means fewer bookstores, although their studies predate the Internet bookselling era and the effects ‘one-world publishing’ has had. V Ringstad, ‘On the Cultural Blessings of Fixed Book Prices’ (2004) 10 (3) International Journal of Cultural Policy. ; F Fishwick, S Fitzsimons *et al.*, *Effects of the Abandonment of the Net Book Agreement : First Interim Research Report* (London: Book Trust 1997); Fishwick, ‘Book Prices in the UK since the End of Resale Price Maintenance’ (2008).

⁵⁷⁷ Comment by Christian Sprang, lawyer for Börsenverein des Deutschen Buchhandels. Pt Editors (2004), ‘The Big Fix: European Book Markets Experiment with Pricing Policies’, <<http://www.publishingtrends.com/2004/10/the-big-fix-european-book-markets-experiment-with-pricing-policies/#sthash.r6oWLcW2.dpuf>>, accessed 04.05.2014. Nonetheless, that more titles are *actually* produced is a point of contention in the literature: After the ending of the Net Book Agreements in the UK, the number of books released reportedly increased (Office of Fair Trading (Report Prepared for the OFT by the Centre for Competition Policy at University of East Anglia), ‘An Evaluation of the Impact Upon Productivity of Ending Resale Price Maintenance on Books’, Centre for Competition Policy at University of East Anglia, OFT 981, 02.2008, at p. 43.

<http://www.offt.gov.uk/shared_offt/economic_research/offt981.pdf>, accessed 04.05.2014. Ringstad comes to a similar conclusion, in relation to the Nordic countries, that the effects of FBP on the diversity of titles are overstated (Ringstad, ‘On the Cultural Blessings of Fixed Book Prices’ (2004).

⁵⁷⁸ Utton, ‘Books Are Not Different after All: Observations on the Formal Ending of the Net Book Agreement in the UK’ (2000); Fishwick, ‘Book Prices in the UK since the End of Resale Price Maintenance’ (2008); Fishwick *et al.*, *Effects of the Abandonment of the Net Book Agreement : First Interim Research Report* (1997).

also has the effect of making backing of less-popular works less risky for publishers because they can cross-subsidise.⁵⁷⁹

Sometimes these are stated explicitly but in general terms, for example the German BuchPrG provides as its purpose:

“[T]o protect [books as a] cultural asset. Fixing the sale price for final customers ensures the preservation of a broad offer of books. The law also ensures that this offer is open to the general public by promoting the existence of a large number of outlets.”

In other cases, they are not written into a law but are nonetheless well documented. The arguments proposed by the French Culture Minister Jack Lang in support of what would become ‘his’ law, were that a fixed book price would permit:

- ‘*Equality* of citizens before the book’. This was a rather elaborate way of saying that the same book could be purchased for the same price throughout the whole French territory;
- *Access through a solid decentralised distribution network*. There should be a number of bookshops through which consumers can gain access to books, but also a distribution network that allows for books not held in stock to be ordered and delivered quickly and at no additional cost.
- *Content plurality (diversity)* through cross-subsidisation at the publisher and bookseller levels; this enables the profits made from bestsellers to be offset against the costs and losses of ‘heavy works’ (including the category of works which Alfred Marshall refers to as ‘grave scientific literature’⁵⁸⁰). Without assurance of a certain predictable margin, publishers would not be incentivised to take risks on works.

The first two of these policy interests (equality and access) relate to the structure of the supply chain and more specifically the way that books are distributed to end consumers. The third rather relates to content: The aim is to ensure the best possible diversity of published works, but also has a distribution aspect, insofar as cross-subsidisation can occur at the bookseller or publisher level.

⁵⁷⁹ Although this section is not intended as a criticism of FBP, it can be noted that whatever the justification, this does not seem to support the objective of ensuring access to books because the implication is that a certain part of the population will be less able afford the popular books they are most likely to want access to.

⁵⁸⁰ Guillebaud, ‘The Marshall-Macmillan Correspondence over the Net Book System’ (1965).

2. *Do the objectives translate to e-books?*

The French example is used throughout this section because of the extensive debates that took place in the run up to the adoption of the French e-book law. In particular, the French Competition authority,⁵⁸¹ which was called upon by the Minister for Culture and Communication to give an opinion on the possibility applying FBP to e-books and the compatibility of such a system with Article 101 TFEU and French competition law, gives brief consideration to the question of whether a law is necessary for the objectives of the loi Lang (equality, access, diversity) to be attained in the e-book context. It was sceptical as to whether this was the case, however, the 2011 fixed e-book pricing law was adopted nonetheless. In the report from the Commission for Culture, Education and Communication on fixed e-book pricing, it was said that the law:

“[A]ims at protecting the market from operators outside of the creative industries from taking control and at levelling the playing field (for retailers), promoting diversity of both titles and distributors and respecting the rights of authors.”⁵⁸²

This objective sounds distinctly similar to those in the e-book context. In the run up to the adoption of the French law, it became apparent that the objectives were felt to translate into the e-book environment.

From the above section laying out the objectives of fixed pricing in the book context, we can say that although diversity of content is an important (perhaps the most important) aim of FBP, there is also a strong element of protecting the structure of the market which is specific to the print book, bricks and mortar context (ensuring diversity of supply outlets, a strong distribution network and access to bookstores). As the supply chain becomes disjointed in the e-marketplace, some the objectives of FBP may become obsolete in the digital context.⁵⁸³

⁵⁸¹ Autorité de la Concurrence (2009), ‘Avis N° 09-a-56 du 18 décembre 2009 relatif à une demande d’avis du Ministre de la Culture et de la Communication portant sur le livre numérique’, 19.12.2009, para. 65.

⁵⁸² See the extract given in Annex to Rapport n° 339 (2010-2011) de Mme Colette Melot, fait au nom de la commission de la culture, de l’éducation et de la communication, déposé le 9 mars 2011, p.33. “cette mesure vise à protéger le marché d’une prise de son contrôle par des opérateurs extérieurs à l’économie de la création et dont l’objectif serait la commercialisation d’autres produits ou services, reléguant les œuvres culturelles au rang de produit d’appel. Elle vise en outre à permettre d’imposer les mêmes conditions à tous les acteurs du secteur, de favoriser la diversité de la diffusion et, partant, la diversité de l’offre, dans le respect des droits d’auteur.”

⁵⁸³ Arguably the same could be said for the effects of e-commerce on sales of print books, but this is not the focus of the current chapter.

a. Objectives that translate

One of the objectives that seems to translate into the e-book context is that fixed pricing strengthens rightholders positions by giving them price control. This provides foreseeable margins, allowing them to take risks at the production level and contributes to ensuring a diversity of published works. Like the arguments in the print book context and in the agency pricing debate, the argument is that authors (or publishers) are best placed to price their products to ensure margins are met. This becomes perhaps even more relevant when content is sold online because in an environment with high price transparency, consumers are able to switch between stores and find the lowest price with little difficulty.

Relatedly, there is a fear that allowing price competition in the market means that the lowest price will win out, regardless of services or other non-price elements of competition. One of the arguments of the French competition authority in favour of fixed e-book pricing was that if it was not adopted, a concentration in the downstream retail market could occur leading to a single (low) price point as occurred in the digital music market⁵⁸⁴: Consequently and relating to the above point, this could result in publishers being less able to balance their risk, becoming less likely to publish works that are not certain to sell.

In addition, it can be noted that while this objective of fixed pricing is the same for both the print and e-book context – thereby indicating under our framework that equality would necessitate the application of FBP to both –, the consequences of large international retailers which also produce e-reader hardware through a vertically integrated system to take control of the retail market by price competing are perhaps more profound than in the print environment. ‘Amazonophobia’ is real, oiled by the lack of a common standard for interoperable e-books formats and DRM. If e-book readers or tablet (i.e. hardware) manufactures are also selling e-books to be read on those devices, of course it is in their interests to sell content at a low price as this increases the appeal of devices on their primary market. However, once a consumer purchases their device, they find themselves locked into that retailer’s ecosystem precisely due to the lack of format interoperability and DRM protection. If they wish to purchase more content, it must come through that manufacturer – as such, the manufacturer has an incentive to increase prices because consumers have a high(er) cost of switching. In the e-book context therefore, removing price competition also has the effect of levelling the playing field for e-reader sales, although this may be an objective of FBP too far detached from the content to be considerable.

⁵⁸⁴ France - Autorité de la Concurrence Avis N° 09-a-56 (2009), para. 76 et al.

b. Objectives that do not translate or are different in the e-book context

As an example of an objective that loses relevance, we can say that in the e-book context, an extensive distribution network seems to be met by the very nature of the Internet: Anybody, anywhere can access books online, at any time. A fixed pricing system is not needed in the digital context to attain a dense distribution network because books ordered online are delivered directly ‘short circuiting’ the traditional supply chain by removing bookstores from the equation. This observation is of course not specific to e-books; print books too can be ordered online, and delivered at a standard charge anywhere in the territory.⁵⁸⁵ However, for e-books this impact is elevated further still because delivery times are of no import; this instantaneous online delivery further breaks down the equality argument and the need for FBP in order for it to be met.

If one looks more closely at the discussions surrounding what emerged as the access and distribution justifications for e-book fixed pricing, it is possible to see that what is aimed at is not actually distribution and access to e-books, but rather to printed books in traditional bookstores. According to the French Senate, the law aims ‘to provide a framework that respects French heritage and copyright as well as concerns for preservation of the diversity of literary creation and cultural development through bookshops.’⁵⁸⁶ In this light, it looks like the accessibility objective of the e-book law is actually aimed at preserving accessibility to *printed books* through bookstores by maintaining publisher set prices in all outlets, under the assumption that publishers will not want e-books to be sold at significantly lower prices than print books and so will not divert competition from the traditional model. The French government is then using e-book FBP to benefit the print publishing supply chain alone; under our however framework this would not be a reason to apply equal treatment.

The move in focus from access to preservation of a particular supply chain is important: Under our rule-objective equality analysis this seems to signal a difference in objectives that would mean ‘difference’ rather than ‘likeness’ exists between FBP and e-FBP. This being the case, under the analytical framework of this thesis e-books should *not* be treated like print books in the FBP context. Not only this, but it is interesting also to note that in actual fact the system of e- and p-book pricing in France does not guarantee the desired outcome either: The publisher set e-book price does not (by law) correspond

⁵⁸⁵ Although delivery surcharges to remote regions may still be problematic. For evidence from Scotland see Citizens Advice Scotland and S Beattie-Smith, ‘The Postcode Penalty: How Some Online Retailers Are Disadvantaging Scottish Consumers’.

<http://www.cas.org.uk/system/files/publications/PostcodePenaltywithcovers_0.pdf>, accessed 07.05.2014.

⁵⁸⁶ French Senate (2010), ‘Proposition de Loi Relative au Prix du Livre Numérique, Présentée par Mme Catherine Dumas et M. Jacques Legendre Sénateurs’, No . 695 Seconde Session Extraordinaire de 2009-2010, 8 septembre 2010, Paris, 08.09.2010.

to the print book price, meaning that publishers could price e-books below print books (some maintain they *should* do this because of the reduced marginal costs of e-books), prompting increased migration to the new format. Alternatively, even if prices correspond, consumers might simply prefer e-books because they are more accessible (e-books can't run out of stock) than going to the book store, or prefer to purchase print books online for this very same reason. This reiterates the interconnection between print books and e-books, but unfortunately does little to contribute to any more concrete understanding of how this functions beyond the objective idealism of the political sphere.

Finally, it is relevant to note that the French government noted an objective in the e-book context does not (realistically) exist in the print one: Fixed pricing could help to reduce piracy. However, this objective is decisively underdeveloped how exactly FBP is intended to achieve this was not actually discussed at any point throughout the legislative process⁵⁸⁷ and the European Commission too was notably sceptical of the ability of FBP to reduce piracy.⁵⁸⁸ The logic appears to depend on publishers pricing e-books at a point that makes legal offers more attractive – when coupled with e.g. good services of retailers – than pirated ones. In theory price adjustments should be easy to make in the digital context to respond to the market, but it seems that these adjustments are seldom made and that e-books are often sold at price points similar to print books. Perhaps the point to be made here is similar to the one noted above, that with a FBP system it is publishers or authors directly (i.e. the players closest to book content) who are calling the shots and fighting against piracy; it is not retailers who are lowering prices and affecting margins in the battle against free.

III. ACHIEVING OUTCOME EQUALITY: IMPACTS AND TECHNOLOGICAL CHALLENGES

The above section has discussed that in the FBP context the objectives are more supply chain specific than for our other case studies. The objectives of print FBP seem to translate less easily into the e-book environment, although some do remain a valid concern. Because of this questionable translation capacity, the case for arguing that equality should be applied based on our rule-objective standard is much less prominent

⁵⁸⁷ France - Autorité de la Concurrence Avis N° 09-a-56 (2009), para. 50.

⁵⁸⁸ In reaction to the draft version of the 2011 law, it questioned specifically if the fixed price itself might not be perceived by consumers as unattractive and in fact itself incite illegal downloading of e-books and wondered: Has the government itself considered this? European Commission (2010), 'Première Notification No 2010/626/F: Avis Circonstancié et Observations de la Commission Européenne du 13 décembre 2010', Contained in Sénat, rapport fait au nom de la Commission de la Culture, de l'éducation et de la Communication sur la proposition de loi, modifiée par l'assemblée nationale, relative au prix du livre numérique, par Mme Colette Melot, Sénateur [2011] No. 339, p. 33-44, Detailed Opinion of 13.12.10.

here than in the exhaustion and VAT contexts. However, some objectives do hold and it would in reality be for the national legislator to decide if this necessitates equality; as was reiterated at the start of this thesis, an accepted but prominent flaw of any equality based analysis is the subjectivity of application of the standard for such equality. On the assumption that in this area the decision would rest with the national level, and that at least some MS would indeed wish to argue that FBP should be applied to e-books under our framework, this section will move on to examine how exactly this could be done and what ‘neutralisation’ measures would need to be put in place to ensure an technology neutral implementation achieving the same outcomes for both p-and e-books. It seems that again in contrast to the previous case studies, in this context securing the objectives is particularly difficult to achieve given changes in technology, floundering territorial boundaries and the fine line between national policy and infringing the free movement rules in this area.

In order for FBP systems to work, they require ‘watertightness’⁵⁸⁹: Both *theoretical universality*, referring to the need for publishers to organise their distribution channels in such a way so as to ensure retailers are committed to applying the set price, and *factual universality*, that is, the actual implementation of the contracts, are required.⁵⁹⁰ Watertightness is necessary because without it price competition emerges between publisher-fixed and ‘free’ price books. In the e-book environment, this watertightness can be compromised and the FBP system undermined in a number of ways:

- (1) if cross-border sales are not covered by the law, given the increased transparency of the online retail environment consumers can more easily circumvent the fixed price by clicking between websites;
- (2) if e-books for the purposes of the law are given too narrow a definition, functions can be developed/reduced, DRM excluded/included, etc so that some e-books potentially in competition with FBP ones fall outwith the definition. Due to technological tweaks price competition through the non-application of the law becomes a feasible option;
- (3) where new business models, such as rental or subscription, fall outside the law and are potentially in competition with download-to-‘own’ models covered by the law.

⁵⁸⁹ This term is used by Charbit in his 1993 article in the French context; see Case 355/85 *Mr Driancourt, Commissioner of Police, Thouars, Carrying out the Duties of Public Prosecutor v Michel Cognet*, [10]. However, the term itself seems to derive from the attempts of the German Federal Cartel Office to ensure ‘Lückenlosigkeit’, that is ‘no leaks’ within the system of RPM; see The concept itself is well described in the German context Bittlingmayer, ‘Resale Price Maintenance in the Book Trade with an Application to Germany’ (1988), p. 806.

⁵⁹⁰ V Emmerich, ‘The Law on the National Book Price Maintenance’ (2001) 2 (3/4) European Business Organization Law Review, p. 559.

This section considers each of these impacts in turn. A substantial further impact of the e-book environment is that there is no ‘import’ or ‘re-import’ market because under the current rules there can be no exhaustion of e-books; special rules for imports are not needed and no ‘circumvention rule’ is necessary. The matter of exhaustion has been dealt with extensively in Chapter 5 and will not be considered further in this context, however it is interesting to briefly note that the lack of exhaustion is reflected in the French e-book law to the extent that there are no provisions dealing with imports or circumvention through re-importation because e-books cannot be ‘re-sold’. They are rather subject to licensing agreements for specific countries through contracts between publishers and e-book sellers, meaning that the subsumption approaches of Austria and Germany which also transfer over the circumvention rules to e-books are of no relevance in practice. It can also be noted that limitations on cross-border sales are not an issue of copyright (copyright over works being granted on a language rather than country basis), but are the result of licencing agreements which do limit sales territorially, often in order to guarantee compliance with national e-FBP. Failing to apply e-FBP in countries where it is required would entail fines for both retailers and publishers (see also the discussion in Chapter 2, Section III.3.b).

I. *Cross-border sales*

The notion of ‘watertightness’ has been used to argue against EU law interference with transnational and internal fixed book pricing systems since the 1970s. The argument is that in order for the diversity enhancing cross-subsidisation to take place, fixed and ‘free’ prices cannot coexist. The relative elasticity of the market and the temptation of alternative lower-priced offers would otherwise pull consumers out of the FBP system.

As has been noted in Chapter II, distance between the buyer and seller is less relevant in the digital intangible environment, even if barriers to cross-border electronic trade do still keep the number of active ‘European’ buyers low. Where e-books can be offered by retailers outside the FBP system for a lower price on a website that is only a click away (even if it is based in another MS), the temptation of lower prices creates a ‘leak’ in the system.

Where e-books are covered by the same provisions as the book pricing law, the system is not well adapted to prevent such a leak. As has been noted, in the traditional supply cycle cross-border sales were a rarity and where they did take place their scale was not large enough to ‘sink’ the system. Fixed pricing laws that contain precisely the same provisions to physical and e-books (Austria and Germany’s approach) are not well suited to counter this impact. In the Netherlands, the importance of watertightness for FBP

was picked up on in the ‘Digitally Binding’ report, commissioned by the Dutch Government. The finding that watertightness is too difficult to maintain in the digital environment because the FBP system can be too easily sidestepped, risking ‘jeopardis[ing] the collective interest [...] in a wide and varied distribution network for physical books, also in the digital age’ was one of the factors that led to the rejection of a FBP law for e-books.⁵⁹¹

The system of e-book pricing in France was, in contrast, conceived specifically to limit the possibilities for outside sales affecting the scheme. As was noted in the previous sections, the French e-book law has extraterritorial effect: National e-book fixed prices are applied even where French consumers buy e-books from non-French retailers. This risky approach from an EU law perspective was deemed necessary to protect the integrity of the FBP system and to achieve its objectives. Insofar as the system binds also retailers outside of France, the law risks impeding the free movement of e-books between states; in particular, the provisions of the Services and E-Commerce Directives are at stake.⁵⁹² Nonetheless, extraterritorial effect was – mistakenly in the view of the current author for the same reasons as the Commission, namely the likelihood of an effect on trade – thought to be acceptable under both the E-Commerce Directive and the Services Directive insofar as they provide that they do ‘not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.’⁵⁹³

The dangers from an EU law perspective were commented upon by the European Commission during the drafting process when it submitted two ‘avis circonstancié’ (detailed opinions) in response to the transmission of the draft law by the Senate, as required under Directive 98/34/EC (formerly 83/189/EEC), which imposes an obligation upon MS to notify to the Commission and each other all ‘draft technical regulations’ concerning products and Information Society Services.⁵⁹⁴ The first opinion of the

⁵⁹¹ J Poort *et al.*, ‘Digitally Binding: Examining the Feasibility of Charging a Fixed Price for E-Books’ (2012).

⁵⁹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (‘E-Commerce Directive’) OJ L178 /01; Directive 2006/123/EC of 12th December 2006 of the European Parliament and of the Council on Services in the Internal Market (‘Services Directive’) OJ L376/36 of 27.12.2006. See the explanation of the Culture, Education and Communication Committee Rapporteur Colette Mélot in French Senate (2010), ‘Comptes Rendus - Prix du Livre numérique - Examen du rapport et du texte de la Commission’, de l’éducation et de la Communication Commission de la Culture, Comptes Rendus 1^{er} Examen du Texte. Ibid: “Quoi qu’il en soit, un large consensus se dégage sur deux points : la propriété intellectuelle doit demeurer la clé de voûte de l’édition; les éditeurs doivent conserver un rôle central dans la détermination des prix.”

⁵⁹³ Articles 1(6) and 1(4) respectively.

⁵⁹⁴ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations (‘Directive 98/48/EC’) OJ L217/18. The Commission Opinions are contained in the Senate document: French Senate (2011), ‘Rapport fait au nom de la Commission de la Culture, de l’éducation et de la

Commission (dated 13th December 2010) was issued in response to the transmission of the original draft law proposed by the Senate. However, as has been noted, still within the Senate at first reading (before the draft was passed to the National Assembly), further amendments were made to the scope of the draft, resulting in a second transmission and subsequent response by the Commission (dated 31st January 2011)⁵⁹⁵. Despite these two interactions with the Commission taking place at a very early stage in the legislative process, the combination of these draft texts very closely relates to the final text and the Commission's concerns remain valid. The Commission looks at the compatibility of the drafts from the perspective of both the free movement provisions and Article 101.

The second Opinion of the Commission is particularly important with regard to the compatibility of the law with the Treaty freedoms of establishment (Article 49 TFEU) and the provision of services (Article 56 TFEU). Measures affecting these Treaty freedoms may apply in a distinct or indistinct manner, however only indistinctly applicable measures can be justified on the grounds of a mandatory requirement in the public interest. If a measure is considered discriminatory, only the Treaty exceptions found in Articles 52(1) (establishment) or 62 (services) will be available to justify its existence. These defences are interpreted strictly and only permitted on the grounds of public policy, public security or public health. It seems likely, especially based on print FBP history examined in Chapter 4, that such a provision would not survive the wrath of EU law even if it was indeed necessary for the survival of the FBP system.

The Commission expresses clear apprehension about the need for extraterritorial application of fixed prices for the law to be effective and the competition concerns this raises under Article 101. This observation is made even in its first Opinion (based on the draft of Article 3 whereby only retailers established in France would be bound by the fixed price) where the law does not actually have extraterritorial effect. The Commission's concerns from a competition perspective may seem at first rather convoluted given that as a *law* we are firmly in the realm of the free movement rules according to the seemingly strict dichotomy of the Treaty.⁵⁹⁶ However, through the lens of the State action doctrine as developed by the Court, public policy decisions have

Communication sur la proposition de loi, modifiée par l'assemblée nationale, relative au prix du livre numérique, par Mme Colette Melot, Sénateur', Senate Report No. 339 of 09/03/2011, pp. 33-56.

⁵⁹⁵ As per the requirements of Article 8 of Directive 98/34/EC: "Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive."

⁵⁹⁶ K Mortelmans, 'Towards Convergence in the Applications of the Rules on Free Movement and on Competition?' (2001) 38 Common Market Law Review. ; JB Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford: Hart 2002), pp. 551-553.

come under competition law scrutiny.⁵⁹⁷ Under Article 4(3) TFEU MS are under a duty of sincere cooperation; they must take any ‘any appropriate measure, general or particular, to ensure fulfillment’ of their obligations as well as refraining ‘from any measure which could jeopardise the attainment of the Union’s objectives.’ Put concisely, this provision places an obligation on MS not to distort competition when it is read with Article 101(I), even although this latter provision is addressed to private parties.

The inconsistency of the CJEU in applying the State action doctrine leaves us with a rather dissatisfactory understanding of its application and scope, however for the purposes of this section it is sufficient to highlight simply that the potentially negative effects of this State action (in the form of the law) on competition in relation to the e-FBP law likely stemmed past experience of the Commission with the German Sammerevers agreement back in the late 1990s and early 2000s.⁵⁹⁸ While not cited, the Commission likely had in mind the allegations of collusion raised by Austrian and Belgian retailers in the context of the (national) German Sammelrevers against German publishers who had ceased to supply them in order to prevent Internet sales to German consumers and in an effort to ensure ‘watertightness’ of the agreement.⁵⁹⁹ Putting this history into the context of the Commission’s Opinion, it is not difficult to see why the Commission anticipates that difficulties will arise here: a law that discriminates against national retailers (by disallowing price competition) to the preference of foreign retailers

⁵⁹⁷ Notably, in the original *Leclerc* case in 1985 the referring court’s questions related only to competition law; the CJEU introduced the free movement provisions and responded based on these. That the competition rules should have been applied was later argued deftly by Pierre Pescatore, ‘Public and Private Aspects of European Community Competition Law’ (1986); Marengo, ‘Competition between National Economies and Competition between Businesses—a Response to Judge Pescatore’ (1986); Pescatore, ‘European Community Competition Law— a Rejoinder by Judge Pescatore’ (1986). On the State action doctrine see D Gerard, ‘EU Competition Policy after Lisbon: Time to Review the ‘State Action Doctrine?’’ (2010) 1 (3) *Journal of European Competition Law and Practice* 202. ; Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (2002).

⁵⁹⁸ For a critique of the State action doctrine see in particular Gerard, ‘EU Competition Policy after Lisbon: Time to Review the ‘State Action Doctrine?’’ (2010), p. 203.

⁵⁹⁹ In June 2000, the Commission had affirmed preliminarily that the new German Sammelrevers did not fall within the scope of EC Competition law since the fixed price was only applicable to publications in Germany and it only applied to imports to the extent permitted by the circumvention rule. Just one month later, complaints were raised by two online retailers, one Austrian and one Belgian that several German publishers had ceased supplies to these retailers, on the basis that they undertook direct cross-border sales to German consumers, thereby circumventing the German fixed pricing rules. Using quite some ingenuity, Libro had even gone so far as to install computer terminals in its German stores, so that consumers in Germany could go online and order titles from its Austrian website and take full advantage of the cheaper offers. Siding with the concerns of the foreign retailers, the Commission alleged collusion between German publishers and wholesalers, which were systematically refusing to supply Internet retailers outside of Germany with the aim of preventing ‘direct cross-border sales of books at a price other than the fixed price for Germany.’ Two years later, in 2002, to resolve the uncertainties with regards to cross-border sales via the Internet as raised by Libro, the Commission accepted undertakings from the national Publishers Associations, the Publisher Random House and bookseller Koch, Neff & Oetinger GmbH clarifying that the sale of books from another Member State to consumers Germany was not to be viewed as a ‘purposive subversion’ of the Sammelrevers. See European Commission (2000), ‘New German System of Fixed Booked Prices Does Not Violate EU Competition Rules as Long as Certain Conditions Are Respected’, IP/00/651, Brussels, 22/06/2000. accessed 10/08/2012; *Comp/34.657 - Sammelrevers and Comp/35.245 to 35.251 Einzelrevers*; K Dyson and KH Goetz, *Germany, Europe, and the Politics of Constraint* (Oxford: Oxford University Press 2004), p. 245; Littoz-Monnet, ‘The European Politics of Book Pricing’ (2005), p. 168.

(who can drop their prices to blow the price of national ones) has the potential to encourage (collusive) collective boycotting of supply to the latter. When faced with the risk that discounting will result in a collective supply boycott by all French publishers, the Commission worries that foreign retailers would not take advantage of the ability to discount at all. In other words, the nationally enforced fixed price, coupled with the threat of non-supply of foreign retailers due to the risk they present to the system, would potentially result in a distortion of competition.

It is also worth remarking that in its opinions the Commission makes reference to national fixed pricing laws for print books, stating that even if these were not likely to appreciably affect trade in the past, if the new law removed price competition between foreign and French retailers, the French law could entail an appreciable reduction in trade of French eBooks between France and other MS.⁶⁰⁰ Here, however, careful wording ensures that the Commission does not depart from its findings insofar as print books were concerned, but gives a firm opinion about this law at least insofar as extraterritorial effect is concerned.

From the above, we can say that if extraterritoriality which is not necessary in the print book context but is apparently (following the French example) necessary to achieve the objectives of FBP in the e-book context, then there is a high risk of such a national policy approach to e-books stepping over the line with regard to European law. It should be recalled however that neither the Austrian nor German approaches have incorporated this extraterritoriality; both their laws apply to e-books in exactly the same manner as they have applied to print books. Whether they achieve their objectives by functioning in this manner is of course of no concern to the European Commission, or at the EU level more generally; so long as the policy does not encroach on free movement, it must be considered a valid approach to cultural policy.

2. *Defining an e-book subject to fixed pricing*

A second difference between print and e-books is one that has already been noted in the previous case studies; what exactly an e-book is by no means certain. For any argument purporting to the importance of watertightness for the survival of a FBP system, it must be understood that the chances for any 'free-price' substitutes for fixed price books to come on to the market must be minimised. The whole concept of watertightness is in this respect linked to 'likeness' for consumers: If someone (a distributor or a consumer)

⁶⁰⁰ European Commission 'Deuxième Notification No 2010/710/F: Avis circonstancié et observations de la Commission Européenne du 31 Janvier 2011', Detailed Opinion of 31.01.11, Contained in Sénat, Rapport fait au nom de la Commission de la culture, de l'éducation et de la communication sur la proposition de loi, modifiée par l'assemblée nationale, relative au prix du livre numérique, Par Mme Colette Melot, Sénateur [2011] No. 339, p. 45-46, p. 55.

can go elsewhere and pick up a substitute copy for less – and in the case of distributors, then sell it for less – why would that person choose the fixed price option?

In Germany and Austria, a definition of an e-book has not emerged. As such, all e-books – whether they exist in print or not, and whether they are ‘facsimile’ editions or have additional multimedia features – are subject to the fixed price. In France for example the situation is somewhat different. The definition of an e-book for the purposes of the FBP law also includes interactive multimedia e-books⁶⁰¹, which means that the definition is broader than that used for the purposes of applying the reduced rate of VAT.⁶⁰² However, in this case (again, in contrast to the VAT law), only e-books that also exist in printed form are subject to the fixed price; this means that prices of self-published e-books can be varied across platforms and formats. Particularly for fiction works, which are relatively price elastic, consumers can be swayed towards promotional discounts. If the scope of a law is not such as to cover all forms and formats that could be in competition, the temptation is there for retailers to discount whatever books they can to increase sales of those.

Linking to the previous observation, it can be noted that a similar problem arises if alternative modes of distribution are available outside the fixed price and if consumers are willing to go to these models as alternatives. Here, it can be noted that the problem of switching is likely brought on by the consumer perception that e-books are overpriced and a substantial investment with no possibility of recoupment on resale (because this does not exist) or any ownership rights attaching to it. Some alternative models of distribution – primarily rental and subscription – have been noted in Chapter II. Although such offers are limited at present, like for digital music and film it seems likely that demand will increase over time in accordance with the decreasing cost of data and the ability to have anytime anywhere access to the Internet.

IV. CONCLUSION

This chapter has shown in the fixed book pricing, our rule-objective framework for deciding if e-books should be treated like print books produces some difficult results. As a first point it is to be recalled that in this non-harmonised cultural field, decisions rest with the MS rather than the EU. This means that consistency may not be achieved by

⁶⁰¹ France - E-Book Definition Decree (2011).

⁶⁰² Assemblée Nationale (2010), ‘Proposition de loi relative à la TVA applicable au livre numérique,’ Paris, 19.10.2010. <<http://www.assemblee-nationale.fr/13/pdf/propositions/pion2876.pdf>>, accessed 17.02.2014; France- DGFIP Rescrit N° 2011/38 (2011).

our framework (because the objectives of FBP as analysed by the MS may differ) but it should still bring rationality to decision making.

From our analysis in this Chapter, is questionable whether the objectives of fixed pricing can translate into the intangible environment because certain aims are too closely related to the physical book supply chain to have any real place in the intangible environment. As has been shown through the example of France, some countries may even justify fixed e-book pricing by the benefits it produces on the print market rather than the digital one; although it is outside the scope of this thesis to consider the appropriateness of this logic, the result for our analysis is the indication that applying fixed pricing to both mediums and justifying it through the need for equality would not be fitting.

Despite the fact that certain objectives do not translate, some others do. Because of this, the Chapter continued on to look at what impacts might need to be neutralised in order for outcome equality to be achieved. Here again, clear difficulties emerged. We saw difficulties again with the definition used for e-books, which must be inclusive (covering different models that could be interchangeable and formats) so as to ensure watertightness. However more concerning was the extraterritoriality that is also needed to ensure this watertightness. There is a fine line drawn between EU law and national policy in this area and from a free movement perspective – under the TFEU, the Services Directive and the E-Commerce Directive – the French approach of including sales by non-French retailers to French based consumers brings clear concerns. As yet, this issue has not been the subject of any investigations at the EU level, although in the view of the present author this should only be a matter of time.

Finally, we can note a last but important reflection: If a MS does find that equality is necessitated by our rule-objective framework, then in order to achieve this it may have to cross the red lines of EU law to achieve watertightness. EU law is unlikely to waiver in this respect, essentially meaning that outcome equality cannot be achieved because the FBP rules cannot (as a matter of EU law) be applied to e-books in an extraterritorial manner. To ensure the correct application of equality *and* the non-infringement of the free movement rules, a MS may therefore have to alter also its book FBP approach, or even remove it altogether. In other words, guided by our equality framework and the EU rules a change to a long-standing force of national cultural policy could be afoot: Digital impacts therefore could be said to drive also an evolution of traditional national cultural policy approaches.

**CONCLUSION: IS EQUAL TREATMENT A PRINCIPLE TO DRIVE THE
REGULATION OF THE MARKET FOR E-BOOKS?**

Recognising that there was a certain schizophrenia regarding how to treat e-books, this thesis firstly set out to establish an analytical framework with a specified standard for ‘likeness’ or ‘difference’ to be judged, so as to determine if equal treatment could be a principle to drive the regulation of the market for e-books. The purpose was to try and insert some rationality and consistency into what is a scattered regulatory landscape. Using the established framework built in Chapter 3, we were able to tackle our case study examples, each of which dealt with a different legal area affecting e-books, in a more logical and linear manner.

An important consideration in undertaking this work was how to approach questions of technology regulation where cultural content is concerned without probing the underlying policy rationales for each individual MS’s cultural policy and the balance between national and EU law. This thesis does not – nor did it set out to – tackle complex questions of efficiency for the publishing sector. Rather, drawing on the vocal but confused utterances about ‘equality’ between e-books as a starting point this work has taken the existing print regulation as a given. It has approached the research question by asking whether existing rules can be reasonably extended to e-books by concretising the outspoken rhetoric of equality into a standardised framework. While queries about the efficiency of existing policies for books have been left aside, this work has nonetheless recognised that market failures and technological functionalities differ between print and e-books through the discussions that took place in the ‘impacts and technological challenges’ sections of the case studies. In each case study, whether the finding was of ‘equality’ or ‘difference’, the framework tells us something about how e-book policy should develop even if print regulation remains constant.

From the dual starting points that (1) there was a distinct rhetoric of equality when discussing e-books, and that (2) there is good reason – as set out in literature on technology regulation and from past experience – not to simply throw away existing rules in new technology contexts, the thesis built a framework to try and inject rationality into the regulatory debates. Recognising that for equality to produce coherent outcomes, a known standard for deciding if something is alike or different must be used. The standard chosen for this work was the objective of the existing rule: Print and e-books should be treated equally if this objective translates into the new technology environment. Moreover, it was argued that the purpose should be to achieve outcome equality, or functional equivalence. Recognising that new technologies function differently and bring certain impacts affecting the working of the rule, it was found that

purely transplanting existing laws would often not lead to equality in the result. Instead, for each of our case studies on copyright exhaustion, reduced rates of VAT and fixed book pricing, we had to see what impacts there were and how they could be ‘neutralised’ by adapting the internal workings of the rule.

Although as noted above this thesis did not question the choice of MS A to apply a particular cultural policy while MS B does not, it does present an analytical framework that means where MS A chooses to apply a policy to print books and the objectives of this rule translate into the e-book environment, MS A should also apply the same policy to e-books. As such, although this thesis does not advocate harmonisation of cultural policies between MS, it does aim to provide rationality in the application of those policies to physical and intangible book content.

The conclusions of the analysis will be discussed in three sections. Section I reviews the findings of each case study chapter; in turn, it review the status quo, considers the impact applying our rule-objective equality framework would have on the status quo, and then comments on how this approach would fit in to current debates and stances. Section II then serves as a final comment on the conclusions to be drawn from our overall assessment, joining the dots and reflecting on several key observations.

I. REVIEWING OUR CASE STUDIES

I. *Copyright exhaustion*

Although the international framework of the WCT does not block the exhaustion of intangibles, for the EU framework this does currently seem to be the case at least in the context of the Copyright Directive. This conclusion was reached through a combined reading of the EU stance in the run up to the conclusion of the WCT, and the decision to provide for the ‘making available via digital transmission’ right under the Article 3 Communication right in the CD in conjunction with recital 29 thereof. Although most recently the CJEU’s *Art & Allposters*⁶⁰³ decision seems to have confirmed that exhaustion can only apply to tangible works under the CD, this is in direct contrast to the Court’s interpretation of the CPD in *UsedSoft*.⁶⁰⁴ At the time of writing, the status quo is to reject exhaustion of intangibles under the CD, however it is hoped the CJEU will further enunciate on this issue using the hints of equality argumentation put forth in *UsedSoft*. In the mean time, hopes of movement at the legislative level seem to have been dashed

⁶⁰³ Case C-419/13 *Art & Allposters*.

⁶⁰⁴ Case C-128/11 *Usedsoft*.

by the Commission's failure (as yet) to elaborate on digital exhaustion in the aftermath of its substantial Copyright Consultation in 2013.⁶⁰⁵

Applying our equality framework to the case of exhaustion, the European doctrine was found to have general objectives – in particular the remuneration and marketability theories – and EU specific objectives relating to internal market completion. When we moved to ask whether these objectives can translate to the e-book context, the conclusion is that this is so. Therefore, under our framework there is indeed a good basis for arguing that tangible and intangible content should be equally subject to the exhaustion doctrine. This is a clear challenge to the current status quo. Chapter 5 was completed with an investigation of the technological impacts of intangibility on the functioning of the doctrine and challenges to achieving outcome equality. It was concluded that outcome equality could be achieved in this case study by framing a rule in a functionally similar manner to that designated by the CJEU in its *UsedSoft* decision.

Our objective-based equality framework would therefore tend to support the extension of exhaustion also to intangibles and necessitate a change to the EU legal framework of the CD. From looking at current debates and stances, it seems however that there is a distinct reluctance to pursue this change: Neither the Commission nor the majority of MS are in favour of e-exhaustion, at least at the moment. Nonetheless, the use of such a framework should be advocated particularly in this area, where so often revisions of the copyright rules are criticised because of the extent to which they are influenced by strong activist lobbies. A structured basis for analysing the question of extension to intangibles could help remove this bias, although the acknowledged flaw of equality (the element of subjectivity that is always implied) may not resolve the issue completely.

2. *Reduced Rates of VAT*

VAT harmonisation through the VAT Directive means that MS are restricted in the rates they can apply, and to which products they can apply these rates to. As confirmed by the CJEU in the cases *Commission v France*⁶⁰⁶ and *Commission v Luxembourg*⁶⁰⁷, the framework of the VAT Directive – in particular Article 98 in combination with Annex III point 6 thereof – currently blocks MS from applying reduced rates of VAT to intangible e- or audio books as they can for 'physically embodied' books. This means that as a matter of EU law, the umbrella of the VAT Directive blocks MS from applying reduced rates to intangible book content. As is evident from the efforts of France, Luxembourg, Spain, Italy and Malta at one point or another to equalise their e-book

⁶⁰⁵ EC - Public Consultation on the Review of the EU Copyright Rules (2013).

⁶⁰⁶ Case C-479/13 *Commission v France (E-Books Reduced Rates)*.

⁶⁰⁷ Case C-502/13 *Commission v Luxembourg (E-Books Reduced Rates)*.

prices despite the EU blockage, there is motivation within the MS to amend the framework to allow this possibility. The Commission too has indicated this willing, and has said it will propose amendments to the VAT Directive in 2016.

The conclusion of our equality analysis in the VAT context was similar to that in the exhaustion one: The core objective of increasing accessibility did translate into the e-book environment, although some of the peripheral objectives relating to the preservation of the traditional supply chain could not be said to have standing in the digital setting. Our objective-based equality analysis would therefore present a challenge to the status quo in this case study scenario also. Moving on to the question of what changes to the functioning of the rule might be needed to ensure outcome equality, Chapter 7 concluded by looking at the differences between p- and e-books and considering that in order to achieve the same outcome, thought would need to be given in particular to the definition of ‘books’ benefitting from the reduced rate, the role of hardware in the supply chain and the greater capacity for general interest benefits to be externalised with increased cross border trading in combination with country of destination taxation.

Much more so than our other case studies, the result of applying our framework to the VAT seems to be quite in line with the current debates and stances on the subject, which also seem to support equalisation: The Commission and several MS as well as industry players are largely in agreement that the current framework should be amended to allow for this possibility. Using equality as a structured framework rather than employing the rhetoric that has often appeared in the debate until this point would thus reinforce the revision of the framework.

However, the EU framework combined with national level decisions to make use of the *option* of reduced rates which are always controlled by the CJEU’s application of fiscal neutrality, means that the picture is not quite as straightforward as would appear. If amendments (foreseen to be proposed by the Commission in 2016) do come, equality in the form of the doctrine of fiscal neutrality will play a role in the national level decision on whether equalisation is necessitated. Under the CJEU’s current application of fiscal neutrality this would be the case where there is comparable consumer use, with comparability to be decided at the national level.⁶⁰⁸ After amendment of the VAT Directive, a MS could apply reduced rates using our outcome-equality framework, but this is then could then be blocked by the CJEU’s application of fiscal neutrality if consumers do not view books and e-books as comparable. The application of a different

⁶⁰⁸ Case C-219/13 *K Oy*.

standard by the CJEU could therefore render the revisions meaningless. Our analysis highlighted in this respect that unless the same standard for making equality-reasoned decisions is used by all levels and all decision-makers then the desired consistency remains elusive.

3. *FBP*

Different from VAT and exhaustion, FBP is an area where there is no harmonisation at the EU level but there has instead been a long process of negative integration to reach the current status quo. MS approaches to FBP do not dovetail with one another, as is the case for our other case studies and have only been shaped by the CJEU to the extent that they affect free movement. With no directional umbrella, MS have made a policy choice between applying FBP or not. As things stand, some MS have also extended FBP to e-books, either by a process of subsumption within existing FBP laws or – as is the case for our core study of France – by creating a separate law for e-books. As yet, the EU has not questioned the application of FBP for e-books, however as was seen in Chapter 7, the extra-territorial effect of the French e-FBP law is questionable from an EU law perspective.

Our consideration of FBP within the equality framework produced rather different conclusions from our other case studies. Using France as the main example, it was harder to translate the access, equality and diversity objectives of FBP to e-books, in particular because of the strong connection these objectives have to the structure of the supply chain. There is therefore some doubt if under our framework a case can be made for extending FBP to e-books also. It can also be said that given that here, like VAT, the decision rests with the national level the flaw of our equality framework comes through: determining the objectives is always going to involve an element of subjectivity, and with no EU direction to frame the rules then more consistency between MS may not be reached through our equality framework because policymakers can always put a spin on the objectives they emphasise.

For FBP another complication emerged that draws an important conclusion: Because of the borderless reach of the Internet, in order to achieve outcome equality between print and e-book FBP the French government found it necessary to pass a law with extra-territorial scope. It was only by also binding non-French retailers to the fixed price when selling to French consumers that the ‘watertightness’ needed to ensure the proper functioning of the system could be ensured. This extension of the scope of FBP in the e-book context brings potential implications for EU free movement and brings about an interesting observation: If our equality framework mandates FBP for both print and e-books, but to achieve outcome equality the framework crosses the red lines of EU law

then this would imply changes also to the national print book framework so that it can be in keeping with both EU law and the principle of equality. Where the standard for equality is met, p- and e-book regulations become interconnected and one may have to give way to the other.

Fitting our approach in with current stances, debates about FBP for e-books vary between MS, just as print book FBP is essentially a question of national cultural policy with little influence of EU law. The French example shows how far a MS might be willing to go to instate this policy – by incorporating an element of extraterritoriality against the explicit cautioning of the Commission the strength of the national political will is clearly demonstrated. Our analysis is most problematic for this case study, because if the FBP law for e-books does indeed need to stretch extraterritorially to achieve the same outcome as FBP for print books, this causes problems from an EU law perspective. The red lines of EU law are set and not likely – as we have learned from the long process of negative integration – to budge for such a policy. Thus, if EU law and equality are not to be compromised, the boundaries of the national approach to FBP will need to be.

II. JOINING THE DOTS

A few final words remain to be said to round off our analysis.

1. The framework is more important than the standard

In each of the case studies the objective of the rule was used as the standard for deciding whether there was likeness or difference between print and e-books. As was noted in Chapter 3, although this standard was chosen and applied throughout this work, an alternative standard could equally be used, the point being that applying a set framework with a known standard should inject rationality whatever that standard may be. By way of comparison, a consumer use standard – the standard currently employed by the CJEU in fiscal neutrality cases – might have produced different results regards whether e-books and print books should be treated alike. By tweaking the framework alternative outcomes could be achieved, as highlighted in the VAT case study, but nonetheless more consistency could be attained by using a known framework at all levels of decision making, rather than relying on forceful lobbying or political goals.

2. Rationality can be injected but consistency depends on the level of the decision

Our framework provides a structure for resolving questions of how to regulate new technologies; in this sense, it does serve to insert rationality into the debate. However what has come through in all the case studies is that it may not always be possible to highlight the important objectives of the rules because most rules aim at many different

things.

As Chapter 3 highlighted, the status quo for the VAT, exhaustion and FBP frameworks has been reached through a process of negative integration and harmonisation. However, the influence of each process varies between the case studies and as such the balance struck between national and EU decisional powers unmistakably differs. Depending on the area of law, the decision about what the core objectives are might be made at the EU level (e.g. exhaustion), national level (e.g. FBP) or a combination of the two (e.g. VAT – firstly through the Directive then in the option to make use of the reduced rate).

This decision will always contain an element of subjectivity which unfortunately is difficult to counter. The application of our framework therefore always implies a level of unpredictability which contradicts its consistency aim. Where rules are set at the EU level (for exhaustion this is the case, for VAT this is also so although the implementation is done by MS) then there will be greater dovetailing between MS because their policy choices would be limited by the EU application of the equality framework. For FBP however the situation is distinctly different, given the longstanding wariness of the Commission in particular to intervene. This means that in our third case study the decisional capacity is contained at the national level and will ultimately be a matter of cultural policy; the consistency enhancing purpose of our framework may therefore have little effect.

Following on from this, it can also be noted that rule-objective equality does not necessarily provide consistency across different areas of regulation: Our framework does not say that e-books should *always* be treated the same as printed books because the rules, their objectives and their functioning are specific to the area at issue. Our analysis does indicate that there is reason to argue for equality between p- and e- when it comes to VAT, FBP and exhaustion individually, but as noted this finding will always be dependant on the importance allocated to the objectives of the existing rule, which may be multi-fold, and the level of the decision.

3. *Some rule objectives translate better into the intangible environment than others*

Our case studies on VAT reduced rates and FBP in particular highlighted that supply chain specific objectives – such as having bookstores with a local presence, or a maintaining a decentralised distribution network for those bookstores – often underlie the existing rules. These objectives, which can be efficiency-related and based on the linear supply chain of the print industry are not so easily translatable because the purpose of the rule no longer has a clear basis. In contrast, content based rules that aim to increase diversity of content can be said to have broader general interest objectives;

these are easier to translate and where these are seen to be the core objectives of the rules there is greater force behind equality argumentation to apply the same rules to e-books. Following on from our previous last observation, we can project that this difference between content protection (or culture protection) and supply chain protection would also be apparent in other areas and sectors.

4. *Our framework could be useful for regulatory decisions about intangibles other than e-books*

The discussion on e-exhaustion is particularly important to the broader context as it goes beyond e-books to cover *all* intangibly transmitted content; thus, the application of our framework could bring about a re-think that is important for the spread of intangible content far beyond the scope of our limited case study.

Going further, we may also project that equality based reasoning could form a useful basis for broader debates; already it has played a role in e-signatures but we could also think of considerations such as how to regulate digital currencies as compared to traditional transactions, and – related to exhaustion – how we should treat e-lending issues.

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