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The Exhaustion of Distribution Rights for Digital Content in the Digital Age: A Comparative Analysis of EU Law and Turkish Law

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Copyright

Abstract

The principle of exhaustion is a fundamental legal doctrine that limits the distribution right of the copyright holder and aims to establish a fair balance between the protection of intellectual property and the free movement of goods. Traditionally designed for tangible copies (such as books, CDs, etc.), whether this principle also applies to digital content downloaded or accessed via the internet has become one of the most significant debates in modern copyright law. This article analyzes the boundaries of the exhaustion principle in the digital environment, particularly with regard to software and other digital works (e-books), by comparing the case law of the Court of Justice of the European Union (CJEU) with the jurisprudence of the Turkish Court of Cassation.

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TABLE OF ABBREVIATIONS

CJEU : Court of Justice of the European Union

EU : European Union

FSEK : Fikir ve Sanat Eserleri Kanunu

IP: Intellectual property

IPR : Intellectual Property Rights

TR : Turkish

TRIPS : Agreement on Trade-Related Aspects of Intellectual Property Rights

US : United States

WCT : WIPO Copyright Treaty

The Exhaustion of Distribution Rights for Digital Content in the Digital Age: A Comparative Analysis of EU Law and Turkish Law

INTRODUCTION

Intellectual and artistic property law aims to establish a balance between the protection of authors' economic interests and the dissemination of knowledge and cultural works within society. One of the central legal mechanisms through which this balance is achieved is the distribution right. The distribution right grants authors the exclusive authority to place the original or copies of their works on the market through sale or other forms of transfer of ownership. However, this exclusive control is not unlimited. Through the principle of exhaustion, also known as the first-sale doctrine, the right holder's authority over the further distribution of a particular copy of a work is terminated after its first lawful sale. Accordingly, once a copy of a work has been lawfully placed on the market with the consent of the author, the subsequent resale or transfer of that specific copy generally does not require further authorization from the right holder.

Historically, the exhaustion principle developed in a legal environment in which works were embodied in tangible objects such as books, CDs, or DVDs. In this traditional model, the transfer of ownership of a physical copy allowed that particular copy to circulate freely in secondary markets while the author retained control only over the first act of distribution. The doctrine therefore functioned as an important limitation on the distribution right, ensuring that copyright protection would not extend indefinitely to every subsequent transaction involving a lawfully acquired copy.

The rapid development of digital technologies and the expansion of internet-based distribution models have significantly transformed this traditional framework. In the digital environment,

works are frequently delivered to users through downloads or online platforms without the need for a physical carrier. As a result, the concept of a "copy," which historically referred to a tangible object capable of being transferred between individuals, has become increasingly detached from its material form. Digital files can be reproduced perfectly and transferred instantly, which raises complex legal questions regarding the applicability of the exhaustion principle in the context of digital distribution.

These developments have given rise to the concept of digital exhaustion, which concerns whether the exhaustion doctrine can also apply to works distributed in digital form. In this context, an important legal question emerges: should the transfer of a digital copy through download be treated in a manner comparable to the sale of a physical copy, thereby triggering the exhaustion of the distribution right, or should such transactions instead be characterized as acts of communication to the public that remain under the continuous control of the right holder? The answer to this question has become one of the most debated issues in contemporary copyright law.

At the international level, the issue is also reflected in the WIPO Copyright Treaty (WCT). The WCT recognizes the distribution right of authors while leaving the determination of exhaustion regimes largely to the domestic laws of member states. Furthermore, the treaty distinguishes between the distribution right and the right of communication to the public, particularly with regard to digital transmissions. This distinction has played an important role in shaping the legal debates surrounding digital exhaustion and has allowed different jurisdictions to develop varying approaches to the treatment of digital copies of works.

Within European Union law, the discussion on digital exhaustion has largely been shaped by legislative instruments and the jurisprudence of the Court of Justice of the European Union (CJEU). In its landmark UsedSoft v. Oracle decision, the Court accepted that the exhaustion

principle may apply to computer programs distributed through internet downloads under certain conditions. However, the Court later adopted a more restrictive approach in cases concerning other forms of digital content. In particular, the Tom Kabinet decision rejected the application of the exhaustion principle to the resale of e-books distributed online. These decisions demonstrate that the application of the exhaustion doctrine in the digital environment has not developed uniformly and that different categories of digital works may be subject to different legal interpretations.

From a comparative perspective, the issue is also significant for Turkish copyright law, which is primarily regulated by the Law on Intellectual and Artistic Works No. 5846 (FSEK). The law clearly recognizes the exhaustion principle with respect to physical copies of works placed on the market with the authorization of the right holder. However, the legal framework was largely developed within the context of traditional distribution models, and the application of the exhaustion principle to digital content remains a subject of ongoing legal discussion. In this respect, developments within European Union law are particularly relevant, as Turkish copyright law has historically been influenced by European legal principles and continues to evolve in parallel with international copyright standards.

Against this background, the main objective of this study is to examine the scope and applicability of the exhaustion principle in relation to digital content, particularly in the context of the distribution right. The study seeks to analyze how the exhaustion doctrine operates within traditional copyright law, how digital technologies challenge its underlying assumptions, and how these challenges are addressed within both European Union law and Turkish law.

Methodologically, this research adopts a comparative legal approach. The study examines the relevant directives of European Union law, the jurisprudence of the Court of Justice of the European Union, and the provisions of Turkish copyright law, together with the decisions of

the Turkish Court of Cassation. Through this comparative analysis, the study aims to identify similarities, differences, and potential areas of legal uncertainty regarding the application of the exhaustion principle to digital content.

This thesis is structured as follows. The first part examines the concept of the distribution right and its regulation under both European Union law and Turkish law. The second part analyzes the principle of exhaustion, including its legal foundations and conditions of application. The third part focuses on the concept of digital exhaustion and the challenges arising from digital distribution models within international and European copyright law. Finally, the study evaluates the relevant case law of the Court of Justice of the European Union—particularly the UsedSoft, VOB, and Tom Kabinet decisions—and discusses their implications for the interpretation of digital exhaustion in both European Union law and Turkish law.

1. RIGHT OF DISTRIBUTION

The distribution right is an exclusive economic right granted to the author to rent, lend, offer for sale, or otherwise distribute the original or copies of a work to the public. In Turkish law, this right is regulated as a fundamental economic right under Article 23 of the Law on Intellectual and Artistic Works No. 5846 (FSEK)[1], enabling the author to economically exploit the work by placing it on the market.

In European Union law, the distribution right is primarily regulated under Article 4(1) of the Information Society Directive 2001/29/EC[2], as well as in the Computer Programs Directive

[1] The Turkish Law on Intellectual and Artistic Works (Law No. 5846, hereinafter LIAW) https://mevzuat.gov.tr/mevzuatmetin/1.3.5846.pdf

[2] 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 (infosoc directive)

2009/24/EC[3] and the Rental and Lending Directive 2006/115/EC[4]. As a rule, this right concerns the circulation of tangible (physical) copies such as books, CDs, or records. However, in modern copyright law it has become one of the most dynamic and debated areas, since the provision of works in digital environments is often assessed under the rights of communication to the public or making available to the public**,** leading to ongoing discussions in parallel with technological developments.

1.1.Right of Distribution in European Union Law

Article 4 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs regulates that the right holder has the exclusive right to authorize or prohibit the commercial distribution, including rental, of the original or copies of a computer program.

Pursuant to Article 1 of 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, Member States are under the obligation to provide the right to authorize or prohibit the rental and lending of the original or copies of the work. The second paragraph of the Article stipulates that these rights shall not be subject to the principle of exhaustion upon the sale or other forms of distribution of the original or copies of the work.

In Article 4 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, it is stipulated that Member States shall provide the exclusive rights for

[3] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs

[4] 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

authors to authorize or prohibit any form of distribution to the public, by sale or otherwise, of the original of their works or copies thereof.

The notable point in the Directive is the explicit stipulation that the distribution of the work to the public or making it available by using the rights granted to the author under the right of communication to the public shall not lead to the exhaustion of the right (Article 3/3).

1.2. Right of Distribution in Turkish Law

Under the Law on Intellectual and Artistic Works No. the right of distribution is recognized among the author's economic rights and is granted exclusively to the author. As this right is an intangible absolute right, it may be asserted against anyone who infringes it.

According to the provision stating that "The pecuniary rights under this Law shall pass by inheritance, and testamentary dispositions regarding these rights are permissible" (Article 63 FSEK), the right of distribution passes to the heirs of the author upon the author's death. However, pursuant to Article 27 of the same Law, the heirs' right of distribution expires seventy years after the death of the author.

The right of distribution may be restricted on the grounds of public interest, within the scope of Articles 30–37 of the FSEK, and on the grounds of private interest, within the scope of Articles 38–41. Nevertheless, as this issue falls beyond the scope of the present study, it will not be addressed herein.

In the first paragraph of Article 23 of the Law on Intellectual and Artistic Works No. 5846 (FSEK), it is stated that "the right to distribute the original or copies of a work by way of rental, lending, offering for sale, or other forms of distribution" belongs exclusively to the author.

However, the Law provides no definitions for any of the examples listed therein. This is because the legislator has deliberately avoided introducing any limitation on the exercise of the right of distribution. In other words, the acts enumerated in the provision are not exhaustively regulated but are merely illustrative examples of how the right of distribution may be exercised[5].

For this reason, instances such as donating a work or exchanging it under a barter agreement have also been accepted as forms of distribution falling within the scope of the right of distribution[6].

Similarly, the sale of a novel by a publishing house to distributors, or the rental of a painting of fine art by its painter to another person, are among the most common examples of the situations referred to in the Law[7].

The original version of Article 23 of the Law on Intellectual and Artistic Works No. 5846 (FSEK), which regulates the right of distribution, provided that:

"The right to exploit a work by placing the original or copies obtained through reproduction from the original or from an adaptation of the work on the market by offering them for sale, distributing, or otherwise putting them into commercial circulation shall belong exclusively to the author."

[5] Fethi Merdivan, Levent Yavuz and Türkay Alıca, *Fikir ve Sanat Eserleri Kanunu Yorumu – Cilt I– (1-48. Maddeler)* (2nd edn, Seçkin Publishing) 946.
[6] ibid, 948.
[7] For the examples given regarding the exercise of the distribution right in architectural works, see Gürsel Öngören, Filiz Ceritoğlu, *Mimari Eserler ve İlgili Yargı Kararları* (Öngören Hukuk Publishing) 78.

For this reason, scholars interpreted that, due to the phrase "by putting into commercial circulation" contained in the provision, the exercise of the right of distribution required the work to be placed on the market[8].

However, following the amendment introduced by Law No. 4630 on the Amendment of Certain Articles of the Law on Intellectual and Artistic Works[9], this expression was removed from the text.

In its final version, the provision now reads as follows:

"The right to rent, lend, offer for sale, or otherwise distribute the original or copies of a work belongs exclusively to the author."

Accordingly, it can no longer be maintained that commercial use of the work is a prerequisite for exercising the right of distribution. In other words, the distribution of a work without it being placed on the market is also sufficient to constitute the exercise of the right of distribution.

Doctrine rightly asserts that the exercise of the right of distribution does not require a profit motive, as the exercise of other economic rights likewise does not depend on a profit-oriented purpose[10]. Therefore, it would be inappropriate to seek the existence of such an intention specifically for the right of distribution[11].

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[8] Duygun Yarsuvat, *Türk Hukukunda Eser Sahibi ve Hakları* (Güryay Printing 1984) 137; Tekin Memiş, *Fikri Hukuk Bakımından İnternet Ortamında Müzik Sunumu* (Seçkin Publishing 2002) 110.

[9] Law No. 4630 on the Amendment of Certain Articles of the Law on Intellectual and Artistic Works https://www5.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc085/kanuntbmmc085/kanuntbmmc08504630.pdf

[10] Burçak Yıldız, 'Eser Sahibinin Yayma Hakkının Tükenmesi', Prof. Dr. Turgut Kalpsüz'e Armağan (Turhan Publishing 2003) 603; Arzu Genç Arıdemir, *Türk Hukukunda Eser Sahibinin Çoğaltma ve Yayma Hakları* (Vedat Publishing 2003) 100.

[11] Gürsel Öngören, *Türk Fikir ve Sanat Eserleri Hukuku Açısından Müzik Eserleri* (Öngören Hukuk Publishing 2010) 109.

1.3. Forms of Exercising the Right of Distribution

1.3.1. Rental

The temporary transfer of a work to a third party in return for a certain benefit constitutes the rental of the work[12]. Although the work must be embodied in a tangible form in order to be rented, it need not be reproduced[13]. For instance, as in the example of renting the original painting depicting the ancient city of Patara, a work may be rented without being reproduced.

The term "rental" was added to the first paragraph of Article 23 of the Law on Intellectual and Artistic Works by Law No. 4110 on the Amendment of Certain Articles of the Law on Intellectual and Artistic Works[14]. Before the inclusion of this expression in the provision, Article 38 of the Law had contained a regulation stating that "unless prohibited by a notice on the copies, the rental of a published work for a fee shall be permissible". Therefore, unless the right holder explicitly prohibited it, a person who had purchased a work could rent it to others[15].

However, since this provision was repealed by the amendment introduced by Law No. 4110, this possibility has been eliminated as of the date the amendment was published in the Official Gazette. At this point, even if there is no statement on the copies of the work prohibiting their rental to third parties, the right to rent the work may now be exercised exclusively by the author (right holder).

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[12] For the concept of rental to apply, it is not necessarily required that a monetary payment be agreed upon; the benefit to be obtained may also constitute the consideration for the rental. See Arzu Genç Arıdemir, *Eser Sahibinin Çoğaltma ve Yayma Hakları* (Vedat Publishing 2003) 109. For the view that rental must involve a specific fee, see Cahit Suluk, Rauf Karasu and Temel Nal, *Fikri Mülkiyet Hukuku* (4th edn, Seçkin Publishing) 95.

[13] Gül Okutan Nilsson, Yalçın Tosun and Eda Çataklar, *Görsel İşitsel Sektörde Toplu Hak Yönetimi: Karşılaştırmalı Hukuk ve Türkiye İçin Öneriler* (Onikilevha Publishing 2014) 92.

[14] Law No. 4110 on the Amendment of Certain Articles of the Law on Intellectual and Artistic Works https://www5.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc078/kanuntbmmc078/kanuntbmmc07804110.pdf

[15] İlhan Öztrak, *Fikir ve Sanat Eserleri Üzerlerindeki Haklar* (2nd edn, Ankara University Faculty of Political Science Publications 1977) 58.

In the Directive 2006/115/EC of the European Parliament and of the Council on rental right, lending right, and certain rights related to copyright in the field of intellectual property, rental is defined as making works available for use, for a limited period of time, either directly or indirectly, for economic or commercial advantage.

In the preamble to the Directive, it is emphasized that protecting the rights of authors, performing artists, and producers of phonograms and films with respect to rental and lending has become increasingly important. Accordingly, Article 80 of the Law provides that performers hold exclusive rights regarding the rental and lending of works, while producers of phonograms and film producers—who have acquired from the author and the performer the right to exercise the economic rights—possess exclusive rights concerning the rental and public lending of such works.

Prior to this Directive, the subject had been regulated by Council Directive 92/100/EEC of 19 November 1992 on rental right, lending right, and certain rights related to copyright in the field of intellectual property[16].

1.3.2. Lending

The term "lending" included in the first paragraph of Article 23 of the Law was added by Law No. 4630 on the Amendment of Certain Articles of the Law on Intellectual and Artistic Works. Lending refers to the temporary transfer of the original or copies of a work to a third party, free of charge and for a limited period of time[17]. If the work is temporarily transferred to a third party in return for payment, this constitutes rental[18].

[16] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

[17] Suluk, Karasu and Nal (n 12) 95; Canan Küçükali, *Karşılaştırmalı Hukuk Işığında Fikri Mülkiyet Hakkı Sahibinin Yayma Hakkının Tükenmesi* (Onikilevha Publishing 2020) 37.

[18] ibid, 95.

In Directive 2006/115/EC of the European Parliament and of the Council, lending is defined (Article 1(3)) as making works available for use, for a limited period of time, through establishments accessible to the public, not for direct or indirect economic or commercial advantage.

1.3.3. Public Lending

Public lending right refers to the act of making a work available to certain institutions and organizations by the author for the purpose of communicating it to the public[19]. For example, the lending of Sâmiha Ayverdi's work "Edebi ve Manevi Dünyası İçinde Fatih" ("Fatih Within His Literary and Spiritual World") to readers by the Atatürk Library of the Istanbul Metropolitan Municipality constitutes an instance of public lending.

In principle, the exercise of this right depends on obtaining permission from the right holders[20]. However, in practice, such permission is generally not sought. Therefore, in order both to bring this factual situation into conformity with the law and to ensure that the efforts of the authors are fairly compensated, a draft law was prepared to introduce a public lending right for libraries.

In the Draft Law on the Amendment of the Law on Intellectual and Artistic Works, a specific provision was proposed under the heading "Public Lending"[21]. The provision— which ultimately remained only at the proposal stage—was worded as follows:

"*Article 34/A — The lending of printed literary and scientific works by public libraries accessible to the public shall be permitted. However, except for libraries of institutions*

[19] Küçükali (n 17) 3, For the benefits of public lending for libraries and readers, see R.Anthony Reese, 'The First Sale Doctrine in the Era of Digital Networks' (2003) 44(2) Boston College Law Review, pp. 577–652, p. 588 https://www.law.uci.edu/faculty/full-time/reese/reese_bostoncollege.pdf accessed 14.03.2026.

[20] Zehra Özkan 'Ödünç Verme Hakkı ve Kamuya Ödünç Verme Lisansı Kapsamında E-Kitaplar' (2017) 12(128) Terazi Law Journal, pp. 32-42, p. 37 https://www.jurix.com.tr/article/7583?u=0&c=0 accessed 14.03.2026.

[21] Draft Law on Amendments to the Law No. 5846 on Intellectual and Artistic Works *http://gesam.org.tr/fikir-ve-sanat-eserleri-kanunu/*

providing compulsory education and training services, those who lend works shall be obliged to pay compensation to the author and the publisher of the work. This remuneration shall be paid to the relevant collective licensing organization and distributed among the authors and publishers who have authorized the relevant collecting societies, based on usage rates, ensuring that at least half of the total amount remains with the authors. The determination and negotiation of this remuneration, as well as the resolution of disputes, shall be governed by Articles 43, 43/A, and paragraphs one and four of Article 43/B. In determining the remuneration payable under this article, in addition to the principles set forth in Article 43, consideration shall also be given to the scientific, social, and cultural purposes of library services".

Article 6 of Directive 2006/115/EC on rental right, lending right, and certain rights related to copyright in the field of intellectual property grants Member States the option to derogate from the public lending right set out in Article 1 of the Directive, provided that authors receive remuneration for such use[22].

1.3.4. Sale

The transfer of ownership of the original or copies of a work to a third party in return for payment constitutes the exercise of the right of distribution through sale. In legal scholarship, it has been noted that not only the act of sale itself, but also an offer to sell—such as offering an unreproduced work for sale on a website—may amount to an infringement of the right of distribution[23].

[22] Council Directive 92/100/EEC of 19 November 1992 on rental right, lending right, and certain rights related to copyright in the field of intellectual property likewise provided in its Article 5 that Member States may derogate from the public lending right, on the condition that authors receive remuneration in return.

[23] Suluk, Karasu and Nal (n 12) 94; In the Draft Law on Intellectual Works prepared by Ernst Hirsch, the offering for sale of reproduced copies was also regulated as a right belonging to the author. See Ernst Hirsch, *Hukuki Bakımdan Fikri Say* (2nd edn, İktisadi Yürüyüş Printing 1943) 183.

1.3.5. Importation

Importation, defined as bringing goods into one country from another, is one of the ways in which the right of distribution may be exercised. The right holder may choose to exercise the right of distribution not domestically but abroad. In such a case, for the work to be distributed within the country—that is, to be imported—the authorization of the right holder is required[24].

The distribution within the country of copies of a work that have already been placed on the market abroad with the right holder's consent, but without obtaining further authorization from the right holder, is referred to as parallel importation. Under Article 23 of the Law on Intellectual and Artistic Works, which governs the right of distribution, parallel importation is permissible only with the authorization of the author (right holder).

1.3.6. Distribution by Other Means

Distribution of a work by other means refers to making available the original or copies of a work through methods not explicitly listed in Article 23 of the Law on Intellectual and Artistic Works[25]. In this context, examples of alternative forms of distribution include the exchange (barter) of a work under a contract of exchange, its free (gratuitous) distribution, or its contribution as capital to a company[26].

2. EXHAUSTION PRINCIPLE

It is quite natural to wish to dispose of a work after a certain period of time following its lawful acquisition from the copyright holder. Known in intellectual property law as the first sale

[24] Merdivan, Yavuz and Alıca (n 5) 959.
[25] ibid, 948.
[26] ibid.

doctrine, the exhaustion principle essentially means that the rights holder no longer has the authority to control the resale of the intellectual product[27].

This principle, accepted in both Turkish and European Union law, is based on various justifications. First, granting unlimited protection to intellectual property rights holders would lead to constant interference in free trade by these individuals, resulting in the market being kept under constant surveillance[28]. Moreover, it is unlikely that a legal system that does not recognize the exhaustion principle would find acceptance in society. However, the principle of exhaustion seeks to strike a balance between free trade and intellectual property rights[29]. Another reason accepted as part of the rationale behind this principle is the idea that the creator of the work has already received compensation for it upon its first sale[30]. Another reason for accepting the principle of exhaustion is the idea that it allows consumers to obtain the work at a lower price, and even that, due to the wear and tear of the work, its value will decrease over time, so consumers can obtain it at a lower price with each sale[31]. In this respect, the acceptance of the exhaustion principle can be characterized as a limitation of the right of distribution in favor of the public.

In the European Union, the principle of exhaustion did not originate directly from copyright law but rather developed from the fundamental principles of the internal market and the objective of ensuring the free movement of goods. This principle refers to the limitation of the

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[27] Enrico Bonadio, 'Parallel Imports In a Global Market: Should a Generalised International Exhaustion be the Next Step' (2011) 33(3) European Intellectual Property Review, 153 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762900 accessed 14.03.2026.

[28] Gül Okutan, 'Exhaustion of Intellectual Property Rights: A Non-Tariff Barrier to International Trade?' (1996) 30(46) Annales de la Faculté de Droit d'Istanbul, 110 https://dergipark.org.tr/en/pub/iuafdi/article/7080 accessed 14.03.2026.

[29] Bonadio (n 27) 153.

[30] Alexander B. Pope 'A Second Look at First Sale: An International Look at U.S. Copyright Exhaustion' 19(1) Journal of Intellectual Property Law, 206. https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1066&context=jipl accessed 01.03.2026.

[31] R.Anthony Reese, 'The First Sale Doctrine in the Era of Digital Networks' (2003) 44(2) Boston College Law Review, 586 https://www.law.uci.edu/faculty/full-time/reese/reese_bostoncollege.pdf accessed 15.02.2026.

right holder's authority to control the circulation of a particular copy once a work or product has been placed on the market for the first time with the consent of the right holder.

The Court of Justice of the European Union, particularly in the *Deutsche Grammophon* decision, stated that a right holder cannot rely on intellectual property rights to prevent the importation of goods that have already been placed on the market[32]. Otherwise, such a situation would undermine the structure of the common market and artificially divide the market into separate segments.

This approach was later explicitly incorporated into European Union copyright law. It first appeared in certain specific regulations, such as the 1991 Software Directive**,** and was subsequently recognized as a general principle with the 2001 InfoSoc Directive**.** According to Article 4(2) of the Directive, when a tangible copy of a work is sold for the first time within the European Union by the right holder or with their consent, the distribution right over that particular copy is considered exhausted.

At the international level, however, the issue has been approached more cautiously. The TRIPS Agreement deliberately refrains from adopting a specific model regarding the principle of exhaustion and leaves states free to determine their own systems in this respect. This situation is the result of a compromise arising from differences in economic interests, where exporting countries generally prefer national or regional exhaustion, while importing countries tend to support international exhaustion. Similarly, the WIPO Copyright Treaty (WCT) acknowledges that the distribution right applies only to physical copies and leaves the regulation of the subsequent sale of such copies to national laws[33].

[32] C-78/70 Deutsche Grammophon Gesellschaft MBH, Hamburg, and METRO-SB-GROSSMARKTE (1971) CJEU ECLI:EU:C1971:59; Peter Mezei, 'Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment' (2015) 6 JIPITEC 23, 27 https://www.jipitec.eu/jipitec/article/view/152/147 accessed 14.03.2026.
[33] The World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty or WCT) Art. 6-7.

The regulations in Türkiye also reflect these general principles. According to paragraph 2 of Article 23 of the Law on Intellectual and Artistic Works, which regulates the principle of exhaustion: "Provided that the right of rental and public lending remains with the author, once specific copies have been sold or otherwise distributed within the country for the first time through the exercise of the right holder's distribution right and their ownership has been transferred, the resale of those copies shall not constitute an infringement of the author's distribution right". According to this provision, once the right holder transfers ownership of the work by carrying out its first sale or distribution within the country, they can no longer interfere with the circulation of that copy in the second-hand market. Indeed, this point has been clearly emphasized in many decisions of the Court of Cassation. According to one such decision;[34] "…the sale of original book copies whose distribution right has been exhausted as second-hand goods does not constitute an infringement of rights arising from the Law on Intellectual and Artistic Works nor unfair competition".

Indeed, websites such as Nadir Kitap and Kitantik operate in Türkiye as platforms where second-hand books are sold. In a dispute brought before it, the 11th Civil Chamber of the Court of Cassation ruled that the sale of a work—whose economic rights belonged to a university—through the website *https://www.nadirkitap.com* as a second-hand copy did not constitute an infringement of the distribution right[35].

In the Law, the principle of exhaustion is stipulated only with respect to the distribution right**,** and other economic rights are not subject to the principle of exhaustion[36]. In legal doctrine, it is stated that this principle has a mandatory nature and that it is not possible to agree otherwise

[34] Turkish Court of Cassation, 11th Civil Chamber, E. 2020/209, K. 2020/3957, 8 Oct. 2020, Court of Cassation Decision Search Database, accessed 04.03.2026.
[35] Turkish Court of Cassation, 11th Civil Chamber, E. 2015/4393, K. 2015/11410, 2 November 2015, Court of Cassation Decision Search Database, accessed 04.03.2026.
[36] Ünal Tekinalp, *Fikri Mülkiyet Hukuku* (Vedat Publishing 2012) 191.

by contract[37]. When examining European Union law and Turkish law, although there are certain differences regarding the territorial scope of application of the exhaustion principle, it can be observed that some common conditions must be fulfilled in both legal systems for the principle to apply. These conditions will be briefly outlined below.

2.1. Common Conditions for the Application of the Principle of Exhaustion in EU and Turkish Law

The most important condition for copies of a work to be subject to the principle of exhaustion is that the first distribution must take place with the consent of the right holder[38]. If a distribution occurs in violation of the limitations stipulated in the contract between the parties, the principle of exhaustion does not apply to those copies[39].The Turkish Court of Cassation held that, despite the agreement between the parties stipulating that the work would be distributed once and as a promotional item in a specific newspaper, the defendant's publication of the work in another newspaper not agreed upon in the contract constituted an infringement of the distribution right[40]. According to the decision: *"Under the agreement between the parties, the promotional activities and distribution of the work at issue were subject to strict conditions. Although the contract stipulated that the book in question would be distributed only once as a promotional item with the Akşam Newspaper, the defendant published the work in another medium (Tercüman Newspaper). Therefore, the exhaustion of the rights arising from the work cannot*

[37] Mustafa Fadıl Yıldırım, 'Bilgisayar Programlarında İkinci El İşlemler' in Prof. Dr. Tekin Memiş (ed), Intellectual Property Law Yearbook (Onikilevha Publishing 2010) 585.
[38] Peter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (2nd edn, Cambridge University Press 2022) 8; Eda Ayşe Atar, *Fikir ve Sanat Eserleri Hukukunda Yayma Hakkı ve Korunması* (Onikilevha Publishing 2017) 119-120.
[39] ibid.
[40] Turkish Court of Cassation, 11th Civil Chamber, E. 2018/5073, K. 2019/6260, 7 Oct. 2019, Court of Cassation Decision Search Database, accessed 04.03.2026.

be considered to have occurred, and the court's determination and reasoning that the plaintiff's economic rights were infringed are justified".

Another condition is that the copy in question must have been lawfully produced and placed on the market. In other words, pirate or counterfeit copies reproduced without the authorization of the right holder do not fall within the scope of this principle[41].

Similarly, works that are used solely under a license or circulated through methods such as rental or leasing cannot benefit from the rule of exhaustion. For the principle of exhaustion to apply, the ownership of the work must have been transferred through sale or by another means. Accordingly, in any case where ownership of the work is transferred with the consent of the author, the principle of exhaustion will apply[42]. In other words, where possession is transferred to another person only temporarily, the principle of exhaustion does not arise[43]. For example, if a work has been rented to another person or lent to the public, the principle of exhaustion will not apply. In addition, even if the author has rented or lent the work, transferring the work to a third party without obtaining the permission of the right holder will constitute an infringement of the distribution right[44].

The final condition is that the work must exist on a tangible medium. Traditionally, this rule was designed for physical goods whose ownership can be transferred and which can re-enter circulation in the second-hand market. For this reason, uses that are in the nature of services or situations not tied to a material carrier are generally not considered to fall within the scope of exhaustion[45]. The fact that the principle is tied to a specific tangible object is related to the transferability of ownership and the possibility of reselling that object. This, in turn, gives rise

[41]Mezei (n 38) 8; Atar (n 38) 119-120.
[42] Yıldız n (10) 584.
[43] Fırat Öztan, *Fikir ve Sanat Eserleri Hukuku* (Turhan Publishing 2008), 370.
[44] ibid.
[45] Mezei n (38) 10.

to the debate as to whether content that can be transferred independently of a physical object, such as digital files, may be assessed within the scope of the principle of exhaustion; this debate will be discussed in detail below.

2.2.Theories Underlying the Principle of Exhaustion

The considerations underlying the principle of exhaustion, which have been briefly explained above, are essentially summarized through three main theories. These are: the author's award theory, the full ownership theory, and the market and competition theory[46]. According to the author's award theory, the primary purpose of copyright is to provide the author with a fair economic opportunity to receive compensation for their creative effort[47]. In other words, when an author, composer, or software developer places a work on the market for the first time, they are free to determine its price and obtain its economic value from that initial sale.

With this first sale, the author is deemed to have satisfied their economic expectation with respect to that particular copy. In other words, the right holder receives their principal "reward" at the moment of the first sale. After that point, it is not necessary for them to retain control over that copy, since their economic interest has already been realized[48].

Put more simply: the system says, "First, let us encourage the creator and ensure that they receive compensation for their effort; but once this has been obtained, there is no need for them to control every second-hand transaction in the market indefinitely"[49].

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[46] ibid, 3.

[47] Antoni Rubi Puig, 'Copyright Exhaustion Rationales and Used Software-A Law and Economic Approach to Oracle v. UsedSoft' (2013) 4 JIPITEC 3, 4 159, 162 https://www.jipitec.eu/jipitec/article/view/124/120 accessed 03.03.2026.

[48] Sena Kontonoğlu Taştan, *The Principle of Digital Exhaustion an Analysis Based on EU, US & Turkish Laws*, (Onikilevha Publishing 2015) 19-20; Mustafa Aksu, 'İnternet Üzerinden Yayılan Eserlerde Tükenme İlkesi? (Dijital Tükenme İlkesi?)' (2016) Journal of Commercial and Intellectual Property Law, 7 https://dergipark.org.tr/tr/download/article-file/270561 accessed 15.02.2026.

[49] Hayleigh Bosher, *Copyright in the Music Industry: A Practical Guide to Exploiting and Enforcing Rights,* (Edward Elgar Publishing 2021) 5-6.

This theory is particularly significant in sectors such as music, books, and software. The main factor motivating creators is the expectation of revenue from the first sale. However, once that revenue has been obtained, preventing the resale of the same copy is not considered economically necessary.

The full ownership theory, on the other hand, is based on the classical understanding of property law. The core idea is that if a person has lawfully purchased a tangible copy of a product, they acquire full ownership rights over that particular copy[50]. In other words, they possess the powers arising from general rules of ownership to use, dispose of, sell, or transfer that copy. According to this approach, when a copyright holder sells a particular copy of a work, they should no longer retain control over that copy, because ownership has already passed to the buyer. The person who purchases the work should be able to dispose of that specific copy just like the owner of an ordinary good.

However, over time copyright has come to be regarded as a type of right that differs from, and is more limited than, classical property ownership. Copyright law is therefore subject to various limitations and specific regulations, such as fair use[51]. For this reason, the "full ownership" approach is no longer considered as strong as it once was, since copyrighted works are not regarded as being entirely subject to free disposition in the same way as ordinary goods[52]. In summary, this theory is based on the idea that "a person who purchases a copy becomes the full owner of that copy, and the general rules of property law should apply".

[50] Mustafa Aksu 'Fikir ve Sanat Eserleri Hukukunda Yayma Hakkının Tükenmesi ve Avrupa Adalet Divanının 3 Temmuz 2012 Tarihli UsedSoft/Orcale Kararının Hukukumuza Bu Açıdan Etkisi Bağlamında Değerlendirilmesi' (2015) 1(1) Journal of Commercial and Intellectual Property Law, 5 https://dergipark.org.tr/tr/pub/tfm/article/228802 accessed 18.02.2026.
[51] Antoni Rubi Puig (n 47) 159, 162 accessed 03.03.2026.
[52] Kontonoğlu Taştan (n 48) 20.

The market and competition theory primarily grounds the principle of exhaustion from the perspective of competition law. Its aim is to prevent the right holder from excessively and unfairly controlling the market[53]. If the principle of exhaustion did not exist, copyright holders could continue to control the secondary market for a copy even after its first sale. They could prohibit resale, determine prices, and thereby create artificial restrictions in the market. Such a situation would weaken competition and create legal uncertainty and high transaction costs for both consumers and businesses. The principle of exhaustion, however, ensures that once a product has been lawfully placed on the market for the first time, it can circulate freely thereafter. This allows secondary markets to emerge, different price levels to develop, and competition to remain dynamic. In summary, according to this theory, the principle of exhaustion protects competition, price diversity, and legal certainty by preventing right holders from exercising indefinite control over the market.

2.3.Benefits of the Principle of Exhaustion

The principle of exhaustion is not merely a simple technical rule that limits the distribution right of the copyright holder. Rather, it is regarded as an important mechanism within the legal system that supports economic functioning, cultural circulation, and social welfare[54]. Once a work has been lawfully placed on the market, the circulation of that specific copy is no longer under the control of the right holder. This allows secondary markets to emerge and enables copies of the work to be freely transferred from one person to another[55].

One of the most evident effects of this mechanism emerges in the economic sphere. The existence of secondary markets allows products to remain in circulation for longer periods

[53] Mezei (n 38) 11.
[54] Kontonoğlu Taştan (n 48) 20.
[55] R Anthony Reese, 'The First Sale Doctrine in the Era of Digital Networks' (2003) 44 Boston College Law Review 577, 585-594, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=463620 accessed 15.02.2026.

rather than being limited to the moment of their initial sale. In this way, consumers can access products at lower prices, while competition in the market also increases[56]. The availability of used products at more affordable prices may compel producers to act more cautiously when pricing new products[57]. Moreover, the possibility that a product can be resold in the future also influences the consumer's initial purchasing decision, as the buyer takes into account the chance of recovering part of the expenditure[58]. This situation is particularly important in interconnected product ecosystems such as video game consoles. Since users can sell their existing devices and games, they face fewer economic barriers when they wish to switch to a different platform.[59].

Another important dimension of the principle of exhaustion relates to culture and access to knowledge. Institutions such as second-hand book markets, libraries, and archives ensure that works remain accessible to society not only during their commercial life but for much longer periods. Even when certain works are withdrawn from the market for commercial reasons, they can continue to circulate through these institutions[60]. This situation is of great importance for the preservation of cultural heritage and for ensuring the sustainable accessibility of resources for academic research. In particular, the disruption of physical distribution during the COVID-19 period demonstrated how important alternative means of access to information and cultural content can be[61].

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[56] ibid 585-594.
[57] İbid 585-592.
[58] Kontonoğlu Taştan (n 48) 21.
[59] ibid.
[60] Aaron Perzanowski and Jason Schultz, 'Digital Exhaustion' (2011) 58 UCLA Law Review, 894-895 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669562 accessed 14.02.2026; Caterina Sganga, ' A Plea for Digital Exhauistion in EU Copyright Law' (2018) 9(2) Information Technology and Electronic Commerce Law, 212 https://www.jipitec.eu/jipitec/article/view/229/224 accessed 14.02.2026.
[61] Peter Mezei and Caterina Sganga, ' The Need for a More Balanced Policy Approach for Digital Exhaustion' in Peter Mezei, Hannibal Travis and Anett Pogacsas (eds), Harmonizing Intellectual Property Law for a Trans-Atlantic Knowledge Economy, 143 https://www.google.at/books/edition/Harmonizing_Intellectual_Property_Law_fo/XGIFEQAAQBAJ?hl=tr&gbpv=1&dq=Harmonizing+Intellectual+Property+Law+for+a+TransAtlantic+Knowledge+Economy++Mezei,+P%25C3%25A9ter&printsec=frontcover accessed 15.03.2026.

The principle is also important from the perspective of individual privacy. When a person can transfer a copy they have purchased as they wish, this transaction occurs outside the control of the right holder. As a result, situations such as tracking every transfer of a work or continuously monitoring user behavior can be avoided[62].

Finally, the principle of exhaustion also promotes innovation and a competitive environment. The existence of secondary markets may encourage right holders to make their products more attractive and to differentiate them in the marketplace[63]. For example, publishers may prepare new editions containing additional content in order to differentiate them from existing editions. In addition, users may act more freely with respect to the copies they own; they may repair, modify, or develop new forms of use[64]. In these respects, the principle of exhaustion is regarded as an important legal rule that both balances market dynamics and supports cultural circulation and individual freedom.

2.4.The Geographical Dimension of the Exhaustion Principle

The geographical dimension of the exhaustion principle refers to national, regional, and international exhaustion. As the geographical scope covered by the exhaustion principle expands, the effectiveness of the author's right of distribution correspondingly diminishes. Therefore, the form of exhaustion that grants the strongest protection to the author is the national (territorial) exhaustion principle[65].

[62] Kontonoğlu Taştan (n 48) 22.
[63] Perzanowski and Schultz (n 60) 896.
[64] ibid 897-899.
[65] Yıldız (n 10) 593.

2.4.1. National Exhaustion

The termination of an intellectual property right within the borders of a single country is referred to as national exhaustion[66].

In other words, where the distribution of a work or its reproduced copies has been carried out by the right holder, and the right of distribution over that work is deemed exhausted only within that specific country, national exhaustion applies[67].

According to the principle of national exhaustion, the distribution of a work in another country, even if made by the right holder, does not result in the exhaustion of the distribution right over the copies of the work in the country where the work is protected[68].

Since the Law on Intellectual and Artistic Works (FSEK) adopts the principle of national exhaustion, the importation of works first sold abroad requires the authorization of the right holder.

However, if the first sale has taken place within the country, exhaustion occurs domestically, and the importation of products that have already been placed on the market abroad cannot be regarded as a violation or as parallel importation prohibited by law[69].

[66] Selin Özoğuz, 'The Principle of Exhaustion of Rights In Turkey', (2005) 13(1-2) Marmara Journal of European Studies, 50 https://dergipark.org.tr/en/download/article-file/1403 accessed 10.02.2026.
[67] Küçükali (n 17) 21.
[68] Ayşe Saadet Arıkan 'Fikri Sınai Hakların Tükenmesi ve Rekabet Hukuku-Uluslararası Ticaret Hukuku Açısından Değerlendirme', (2002) Ankara Bar Association International Law Congress in Cooperation with the Ministry of Culture, 756.
[69] Yıldız (n 10) 593.

2.4.2. Regional Exhaustion

The exhaustion rule adopted jointly by a group of countries forming a particular region is referred to as regional or community exhaustion[70].

For instance, it is stated that the European Union has adopted the principle of regional exhaustion, which is therefore applicable throughout all member states[71].

In other words, following the first sale of a work made with the authorization of the right holder, the right of distribution of the author is deemed exhausted throughout the entire territory of the European Union[72].

In such a case, once the work has been lawfully placed on the market with the consent of the right holder, the right holder is prevented from controlling or restricting the further distribution of that work within the EU member states[73].

2.4.3. International Exhaustion

Where a work that has been placed on the market with the consent of the author or right holder in one country may subsequently be distributed in another country, and the right of distribution over that work is considered exhausted in all countries, the principle of international exhaustion applies[74].

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[70] Özoğuz (n 66), 51.
[71] Alexander B. Pope, 'A Second Look At First Sale: An International Look At U.S. Copyright Exhaustion', (2011) 19(1) Journal of Intellectual Property Law, 207 https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1066&context=jipl accessed 10.02.2026.
[72] ibid 216. In the European Community, the principle of regional exhaustion applies within the 27 member states of the European Union, as well as in three non-member states that are parties to the European Economic Area (EEA) Agreement.
[73] ibid 217.
[74] Arıkan (n 74) 757.

Also referred to as the universal exhaustion principle, this doctrine implies that parallel imports are not prohibited[75]. Among the countries that have recognized the principle of universal exhaustion, Article 26 of the Japanese Copyright Act provides that the author's exclusive right to make a work available to the public shall terminate after the first sale of the work[76].

2.5.Prohibition of Parallel Importation

Parallel importation, in connection with the exhaustion principle, refers to the distribution of a work lawfully distributed in one country by importing it from another country into that country without the permission of the rights holder of the work. In short, it is the importation into the domestic market of a work distributed in a third country with the consent of the rights holder. The provision regarding parallel importation is contained in Article 23 of the Intellectual and Artistic Works Law, which regulates the right of distribution. According to this provision, "The right to bring copies reproduced abroad with the consent of the author into the country and to benefit from them through distribution belongs exclusively to the author. Copies reproduced abroad may not be imported in any form without the permission of the author and/or the holder of the distribution rights authorized by the author. Provided that the right to rent and lend to the public remains with the author, the resale of copies after their first sale or distribution within the country, as a result of the use of the distribution right by the copyright holder, does not infringe the distribution right granted to the author".

The conclusion drawn from the aforementioned provision is that the right to distribute copies reproduced abroad with the author's permission by bringing them into the country is subject to the author's permission, and that no one other than the author may exercise this right[77].

[75] Yıldız (n 10) 593.
[76] Alexander B. Pope (n 71) 220.
[77] Küçükali (n 17) 92.

The Copyright Law addresses national exhaustion[78], so the copyright holder has the authority to prevent parallel imports[79]. If copies are reproduced without the author's consent, parallel importation is not applicable in this case. This is because reproduction without the author's consent is involved, and legal action may be pursued pursuant to Article 66 and subsequent provisions of the Copyright Law.

The United States Copyright Act[80] grants the copyright owner the authority to prevent parallel imports. Section 106 of the Act regulates the right of distribution. The provision states that the copyright owner has the exclusive right to rent, lend, sell, or otherwise transfer ownership of copies of the work to the public. Article 109(a) of the Law states that the legitimate owners of copies of the work may dispose of the work by selling it without the permission of the copyright holder; in short, the exhaustion principle is also accepted under American law[81].

3. THE CONCEPT OF DIGITAL EXHAUSTION

In order to assess the scope and applicability of the principle of digital exhaustion, it is first necessary to examine the provisions set out in international law. This is because, like many fundamental principles of intellectual property law, the principle of exhaustion is shaped not only within the framework of national legal systems but also through international treaties. In this context, one of the most significant international texts concerning the protection of works in the digital environment is the WIPO Copyright Treaty, adopted within the framework of the World Intellectual Property Organisation[82]. The WCT was adopted with the aim of establishing

[78] Tekin Memiş 'Görsel İşitsel İcralara Dair Pekin Anlaşması Üzerine İnceleme ve Değerlendirmeler', in Tekin Memiş (ed), Intellectual Property Law Yearbook (Yetkin Publications 2022), 361.
[79] Küçükali (n 17) 88.
[80] *https://www.copyright.gov/title17/title17.pdf*
[81] For extensive information on the doctrine of exhaustion in U.S. law, See: Alexander B. Pope 'A Second Look At First Sale: An International Look At U.S. Copyright Exhaustion', (2011) 19(1) Journal of Intellectual Property Law, 201-230, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1066&context=jipl
[82] WIPO Copyright Treaty ("WCT").

fundamental principles regarding how the economic rights of copyright holders are to be protected in the digital environment, particularly in light of the development of digital technologies and the increasing prevalence of forms of use carried out via the internet.

The right of distribution and the right of communication to the public, which are among the economic rights granted to authors under the WCT, are regulated under separate provisions. Article 6 of the Treaty stipulates that authors hold the exclusive right to authorise the making available to the public of their works, whether in the form of originals or copies, through sale or other forms of transfer of ownership. Furthermore, Article 7 of the Treaty contains provisions regarding the right of rental in respect of works contained in computer programs, cinematographic works and phonograms.

However, although various proposals were put forward during the drafting of the WCT to adopt a uniform system of exhaustion of the right of distribution at international level, these initiatives were not accepted[83]. For this reason, the second paragraph of Article 6 of the Convention leaves it to the domestic laws of the Member States to determine the conditions under which the right of distribution shall be exhausted following the first sale or transfer of the original or a copy of the work with the author's consent. It is thus recognised that countries are free to choose which system of exhaustion—national, regional or international—to adopt in their national laws[84].

During the diplomatic conference at which the WCT was adopted, interpretative statements were also adopted to clarify the interpretation of certain provisions. These interpretative statements are of particular importance in the context of the debate on digital exhaustion. Indeed, in the interpretative statement regarding Article 6, which governs the right of distribution, it was specified that the terms 'original' and 'copies' used in that article refer solely

[83] Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, 202.
[84] Sterling, J.A.L, *World Copyright Law*, (Sweet & Maxwell Publishing 2003) 931-932.

to physical copies that can be put into circulation as tangible objects. This clarification has become one of the key foundations for interpretations holding that the scope of the right of distribution is limited to physical copies[85].

However, the WIPO Guide to the WIPO Treaties, published by WIPO, states that this declaration of understanding sets out the minimum protection obligations imposed on member states, and that member states may, if they so wish, provide for a broader scope of the right of distribution[86]. In other words, whilst the WCT imposes an obligation on Member States to regulate the right of distribution at least in respect of physical copies, it does not impose any restriction that would prevent the application of this right in respect of non-physical copies.

Article 8 of the WCT grants authors the exclusive right to authorise the communication of their works to the public by wire or wireless means, and explicitly states that this right covers forms of communication that enable individuals to access the works at a place and time of their choosing. This has led to the creation of a new category of rights—referred to as the 'right of making available'—in relation to interactive transmissions carried out over the internet, and has made the distinction between the right of communication to the public and such transmissions clearer at the international level[87].

On the other hand, during the negotiations on the treaty, it was agreed that Member States are not obliged to regulate this right exclusively under the right of communication to the public; if they so wish, they may also regulate it under the right of distribution or another economic

[85] Peter Mezei, 'Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment' (2015) 6 JIPITEC 23, 26 https://www.jipitec.eu/jipitec/article/view/152/147 accessed 14.03.2026.
[86] Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, 203-210.
[87] Muhammed Ertuğrul Akıncı, 'Fikir ve Sanat Eserleri Hukuku Kapsamında Dijital Tükenme', (Master's thesis, Istanbul Bilgi University 2021) 12.

right[88]. For this reason, the WCT has not established a detailed and binding system regarding which economic rights apply to transmissions carried out in the digital environment; it has granted member states considerable regulatory discretion in this regard. Consequently, it is accepted that, provided the minimum protection requirements set out in the WCT are met, member states are authorised to determine the boundary between the right of communication to the public and the right of broadcasting, or to regulate these rights in different ways[89].

It should be noted at this point that the provisions of the WCT are of great importance both under the legal framework of the European Union and under Turkish law. This is because both the Member States of the European Union and Turkey are parties to the WCT[90]. Consequently, in order to assess the applicability of the principle of digital exhaustion under both European Union law and Turkish law, it is first necessary to examine the fundamental framework established by the WCT and to determine how this framework is interpreted within national and regional legal systems.

Indeed, the approach that the right of distribution under the WCT is essentially linked to physical copies, and that transmissions carried out over the internet should be regarded as falling within the scope of the right of communication to the public, presents itself as one of the obstacles to the application of the principle of digital exhaustion[91]. This is because the principle of exhaustion is an institution linked to the right of distribution. Consequently, the question of whether transactions carried out in the digital environment should be assessed under the right of distribution or the right of communication to the public lies at the heart of the debate on

[88] Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, 209.
[89] Akıncı (n 87) 13.
[90] https://www.wipo.int/members/en/ accessed 13.03.2026.
[91] Eleonora Rosati, 'Online Copyright Exhaustion in a post-Allposters World', (2015) 10(9) Journal of Intellectual Property Law & Practice, 674-675, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613608 accessed 14.03.2026.; Peter Mezei 'Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment' (2015) 6 JIPITEC 23, 26 https://www.jipitec.eu/jipitec/article/view/152/147 accessed 14.03.2026.

digital exhaustion. The fact that the WCT has not provided a detailed implementation model in this regard has led to the emergence of differing approaches at the international level regarding the scope and applicability of digital exhaustion, and has resulted in these debates continuing to this day.

3.1.Digital Exhaustion in European Union Law

The scope of the principle of digital exhaustion in European Union law is shaped by case law and the provisions set out in the relevant directives. In this context, there are significant differences in the scope of application of the principle of exhaustion between the Information Society Directive (Directive 2001/29/EC)[92] and the Directive on the Legal Protection of Computer Programs (Directive 2009/24/EC)[93]. Firstly, paragraph 28 of the recitals to Directive 2001/29/EC on the Information Society provides an important framework for determining the scope of the exhaustion principle. This paragraph states that the copyright protection provided under the Directive grants rightsholders exclusive rights regarding the control of the distribution of copies physically incorporated into a work. This approach, in line with the understanding adopted in the WIPO Copyright Treaty, demonstrates that the right of distribution is, in essence, linked to physical copies. It is therefore accepted that this provision largely limits the scope of application of the exhaustion principle to the transfer of copies of works on physical media[94].

Indeed, the wording of Article 4(2) of Directive 2001/29/EC on the Information Society, which governs the principle of exhaustion, also supports this interpretation. Accordingly, where the original or copies of a work are first sold within the European Union by the rightsholder or with

[92] 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 (InfoSoc directive)
[93] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs
[94] Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (2018) 9 JIPITEC, 212, https://www.jipitec.eu/jipitec/article/view/229/224 accessed 14.02.2026.

their consent, or where ownership is otherwise transferred, the distribution right in respect of that copy is exhausted. It is accepted that the concept expressed in the provision as 'that object' refers to the physical copies of the work[95]. This situation demonstrates that the principle of exhaustion was primarily envisaged in relation to the circulation of physical copies.

In contrast, Directive 2009/24/EC on the Legal Protection of Computer Programs uses different terminology. The phrase "that copy" in Article 4(2) of the Directive does not make a clear distinction between the provision of a computer program in the form of a physical or non-physical copy[96]. Furthermore, this Directive does not contain a provision similar to paragraph 28 of the recitals to Directive 2001/29/EC on the Information Society, which links the principle of exhaustion to physical copies[97].

Another significant difference between the two Directives lies in the way the right of communication to the public is regulated. In the Information Society Directive 2001/29/EC, the right of communication to the public is explicitly regulated, and Article 3(3) of the Directive clearly states that the principle of exhaustion does not apply in respect of this right. By contrast, the Directive on the Legal Protection of Computer Programs (2009/24/EC) does not contain a similar provision regarding the right of communication to the public.

These normative differences have paved the way for the principle of digital exhaustion to be interpreted differently in European Union law depending on the type of work, leading in particular to a distinction being drawn between computer programs and other digital content.

[95] Andrew Nicholson, 'Old Habits Die Hard: UsedSoft v. Oracle', (2013) 10(3) SCRIPTed, 402. https://heinonlineorg.uaccess.univie.ac.at/HOL/Page?handle=hein.journals/scripted10&id=391&collection=journals&index= accessed 15.03.2026.

[96] Ahunur Açıkgöz, 'İnternetten İndirilen Eserlerde Yayma Hakkının Tükenmesi İlkesi', (Master's Thesis, Ankara University 2021) 104.

[97] ibid.

Indeed, this distinction has become even more pronounced in the judgments handed down by the Court of Justice of the European Union in subsequent years.

One of the most significant milestones in this development process was the 2012 ruling by the Court of Justice of the European Union in the UsedSoft v. Oracle case[98]. Prior to the decision in question, it was widely accepted that the principle of exhaustion could only apply to copies of works stored on a physical medium. The Divan UsedSoft judgment significantly altered this approach. With the UsedSoft judgment, it was recognised for the first time in European Union law that the right of distribution could be exhausted in respect of a computer program distributed in a digital environment, thereby marking a significant expansion in the debate on digital exhaustion.

Following this development, the 2016 judgment of the Court of Justice of the European Union in VOB v. Stichting Leenrecht[99] addressed a different aspect of the public use of digital works. The issue at stake in this case is whether libraries may lend e-books to users and whether this falls within the scope of the public lending exception. In its assessment, the court acknowledged that libraries lending e-books under a 'one copy, one user' model could produce results functionally similar to the lending of printed books. However, the ruling did not create a general right of exhaustion permitting the resale of e-books for commercial purposes; it merely established a specific exception designed to facilitate public access.

The third and most decisive phase of the debate regarding the scope of the digital exhaustion principle emerged with the European Court of Justice's 2019 Tom Kabinet ruling[100]. In this case, it was concluded that the resale of e-books online is not possible without the copyright holder's permission. The court also stated that, as e-books do not wear out over time like

[98] Case C-128/11 UsedSoft GmbH v Oracle International Corp. EU:C:2012:407
[99] Case C-174/15 VOB v Stichting EU:C:2016:856
[100] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111

physical books and can be reproduced indefinitely without any deterioration in quality, the digital second-hand market could have a serious adverse effect on the economic interests of copyright holders. On these grounds, the principle of digital exhaustion has been rejected in relation to e-books.

When these decisions, which we will examine in detail below, are considered together, it becomes apparent that the principle of digital exhaustion is not applied uniformly under European Union law; rather, it gives rise to different outcomes depending on the type of work. The acceptance of digital exhaustion in relation to computer programs in the UsedSoft judgment has been linked to the functional nature of software and the principle of the free movement of goods. Conversely, the rejection of digital exhaustion in relation to cultural content such as e-books in the Tom Kabinet judgment has been based on the grounds of protecting the economic rights of copyright holders and preventing the risks of digital reproduction. Consequently, a dual structure has emerged in European Union law regarding the legal regime of digital content. Whilst digital exhaustion is accepted under certain conditions for digital products of a functional nature, such as software, a more restrictive approach that safeguards rights holders' control has been adopted for cultural content such as e-books, music or films. This situation demonstrates that discussions regarding how intellectual property law in the digital age should strike a balance between the economic interests of rights holders and access to information and the circulation of content are still ongoing. Below, we will provide a detailed account of the European Court of Justice rulings that are of particular significance within the scope of our study.

3.1.1. Case C-128/11, UsedSoft GmbH v. Oracle International Corp.

The judgment of the Court of Justice of the European Union in UsedSoft GmbH v. Oracle International Corp. (C-128/11) is regarded as one of the most significant precedents in European

Union law concerning whether the resale of software distributed in digital form is permissible[101]. At the heart of the dispute lies the scope of the intellectual property rights held by Oracle over the database software it has developed, known as 'Databank', and the question of whether copies of this software acquired through a licence may be resold on the secondary market.

Oracle holds the exclusive copyrights to the computer program in question and makes the software available to its users primarily through license agreements concluded online. Users obtain the right to use the software by downloading a copy of the program from Oracle's website. This right of use is typically granted under license agreements tailored for a specific number of users. In particular, under agreements known as "group licenses," the software is authorized for use by a specific number of users. For example, under a license agreement issued by Oracle, the software may be authorized for use by 25 users; for a larger number of users, additional licenses must be purchased. Therefore, if, for instance, 27 users wish to use the program, it becomes necessary to enter into two separate license agreements.

The dispute stems from the activities of a company called UsedSoft, which deals in the resale of software. UsedSoft purchases the license rights—or the unused portions of such licenses—from users who have previously purchased Oracle software, and subsequently transfers these licenses to third parties. In particular, the transfer of license rights may involve unused user counts under volume licensing agreements. Individuals who purchase licenses through UsedSoft begin using the software by downloading a copy from Oracle's website.

Oracle has filed a lawsuit in Germany, alleging that UsedSoft's activities infringe on its copyrights. According to Oracle, the agreements entered into with users are not sales contracts,

[101]Peter Mezei (n 91) 34.

but rather license agreements that grant only the right to use the software. Therefore, users cannot transfer their license rights to third parties. Oracle also claims that it explicitly prohibits the transfer of licenses through provisions included in the license agreements. During the appeal phase of the case, the German Federal Court of Justice (Bundesgerichtshof) concluded that the dispute required an interpretation of European Union law and referred the matter to the Court of Justice of the European Union for a preliminary ruling. The national court specifically sought clarification on three key legal issues. The first concerns whether individuals who acquire a license through UsedSoft can be considered "persons who have lawfully acquired the program" under the Directive on the Legal Protection of Computer Programs. The second question concerns whether the right holder's distribution right over a computer program is exhausted when the program is downloaded from the internet. The third question pertains to whether a defense can be raised that the distribution right is exhausted regarding a copy obtained from the internet, provided that the program's first user has deleted the software from their own computer.

In assessing the dispute, the Court of Justice of the European Union first examined the principle of exhaustion of rights as set forth in Article 4(2) of the Computer Programs Directive[102]. Under this provision, the right of distribution of a copy of a computer program by the right holder or with the right holder's consent is exhausted upon the first sale of that copy within the European Union. Consequently, the Court assessed whether, in the specific case at hand, users' downloading of the software from the internet could be considered a "first sale."

The Court has stated that the concept of "sale" as set forth in the Directive must be interpreted not merely in accordance with the law of a single Member State, but within the framework of the unity of European Union law. In this context, the concept of sale has been defined as the

[102] Case C-128/11 UsedSoft GmbH v Oracle International Corp. EU:C:2012:407, para. 55.

transfer of ownership of goods to the buyer in exchange for a specific price. In line with this approach, it has been accepted that an economic sale has taken place when a computer program is offered to users in exchange for a one-time fee, thereby granting them the right to use the program indefinitely.

Oracle, however, has argued that the agreements entered into with users are license agreements, not sales contracts, and therefore the concept of exhaustion of distribution rights does not apply. According to the company, users obtain only a non-exclusive right of use, and this right cannot be transferred to third parties under the terms of the agreement.

However, the Court of Justice of the European Union has concluded that the downloading of software and the conclusion of a license agreement must be regarded as a single economic transaction. When a user downloads the software, accepts the license agreement, and pays a fee in return, they effectively acquire the right to use a copy of the software indefinitely. From an economic perspective, this amounts to the transfer of a copy of the software to the user. Therefore, the Court has acknowledged that referring to the transaction as a license agreement does not alter its legal nature and that it essentially constitutes a sale. The Court also emphasized that there is no difference, in terms of the principle of exhaustion of rights, between the transfer of a computer program via a physical medium such as a DVD and its download over the internet[103]. The download of a program in a digital environment is considered equivalent to the transfer of a physical copy from an economic and functional standpoint.

Another argument put forward by Oracle is that downloading the software from the internet should be considered "communication to the public" under the Information Society Directive[104].The Court did not accept this defense. It stated that if such an interpretation were

[103]ibid, para. 55.
[104]ibid, para. 50.

accepted, right holders could easily circumvent the principle of exhaustion by labeling the distribution of software as a license agreement instead of a sale, thereby rendering the exhaustion principle ineffective. Furthermore, it was explicitly noted that the provisions of the Information Society Directive do not affect the specific rules concerning computer programs. Therefore, the Computer Programs Directive was recognized as constituting a special rule (lex specialis) in this field.[105].

The Court also noted that the principle of exhaustion applies not only to physical copies but also to digital copies downloaded from the internet[106]. Accordingly, the right of distribution is exhausted with respect to a copy of software made available to the public with the consent of the rights holder, and subsequent transfers of that copy cannot be prohibited.

However, the Divan has also clearly stated that the first user to transfer the software must delete the program from their own computer[107]. It has been stated that, otherwise, the program could be used by more than one person at the same time, which would infringe upon the copyright holder's reproduction rights.

The decision also held that it is lawful for secondary users who have lawfully acquired the software to download it from Oracle's website in order to use the program. This is because, under the Computer Programs Directive, reproduction necessary for the program to be used in accordance with its intended purpose is not subject to the rights holder's permission. The downloading of the program was also deemed to fall within this scope.

Consequently, the Court of Justice of the European Union ruled that, provided UsedSoft's customers validly acquire the license rights, they are authorized to download the software from

[105]ibid, para. 51.
[106]ibid, para. 55.
[107]ibid, para. 89.

Oracle's website, and that this download constitutes a necessary and lawful reproduction for the purpose of using the software in accordance with its intended use. With this decision, an important precedent has been established regarding the resale of computer programs distributed in digital form, and a new approach to the transferability of software licenses has been adopted under European Union law.

3.1.2. Analysis of the UsedSoft v. Oracle Case

The decision has been criticized in light of the Court of Justice of the European Union's established approach to interpreting the concepts contained in directives. In its previous case law[108], the Court has held that, unless the legislator has explicitly intended a different meaning, the concepts used in European Union directives must be interpreted in a manner that is consistent with one another and conveys the same meaning. However, it appears that in the decision in question, the court has deviated from this approach to some extent[109].Indeed, while the Court of Justice's decision refers to this precedent, it states that the reasoning regarding the principle that the exhaustion doctrine under Directive 2001/29/EC (InfoSoc Directive) applies only to physical copies does not affect the interpretation of the exhaustion rule under Directive 2009/24/EC on the legal protection of computer programs[110]. This approach has been criticized in legal doctrine on the grounds that it leads to the disjointed interpretation of similar concepts found in different guidelines[111].

The court clarified the conditions for exhaustion under Directive 2009/24/EC on the legal protection of computer programs and acknowledged that a transaction conducted via digital

[108] ABAD, joined cases, Case No. C-403/08, C-429/08, T. 04.10.2011.
[109] Maria Martin-Prat, 'The Future of Copyright in Europe', (2014) 38(1) Columbia Journal of Law & the Arts, 35 https://journals.library.columbia.edu/index.php/lawandarts/article/view/2122/1073 accessed 16.03.2026.
[110] Case C-128/11 UsedSoft GmbH v Oracle International Corp. EU:C:2012:407, para 60.
[111] Ole-Andreas Rognstad, 'Legally Flawed but Politically Sound? Digital Exhaustion of Copyright in Europe after UsedSoft', (2014) 1 Oslo Law Review, 15, http://dx.doi.org/10.5617/oslaw977 accessed 16.03.2026.

download may be considered a sale under certain conditions. Accordingly, in cases where ownership is transferred, the transaction in question is classified as falling under the right of distribution rather than public communication[112]. However, the decision has been criticized in legal scholarship for failing to examine in detail the scope of the right of communication to the public and why a transmission carried out over the internet is treated as falling within the scope of that right[113].It is argued that, rather than discussing the limits of the right of distribution at this point, the court focused on the element of sale necessary for exhaustion to occur, and that its conclusions were based primarily on economic considerations[114]. The reason cited for this approach is that the right of communication to the public by means of making available is not explicitly regulated in Directive 2009/24/EC on the legal protection of computer programs[115].

Although some authors have criticized the UsedSoft v. Oracle (C-128/11) , arguing that the court acted primarily on economic grounds and that its conclusion was based on flawed legal foundations[116], another view—which I also share—holds that the decision strikes a reasonable balance between the interests of copyright holders and the interests of users and reflects an approach consistent with the principle of free movement, one of the fundamental principles of European Union law[117].

[112] Case C-128/11 UsedSoft GmbH v Oracle International Corp. EU:C:2012:407, para 52.
[113] Ole-Andreas Rognstad (n 111) 4-15.
[114] ibid.
[115] Emma Linklater, 'UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?', (2014) 5(1) Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 15 https://www.jipitec.eu/jipitec/article/view/131/127 accessed 16.03.2026.
[116] Ole-Andreas Rognstad (n 111) 15; Martina Gillen, 'The Software Proteus – UsedSoft Changing Our Understanding of Software as 'Saleable Goods', (2014) 28(1) International Review of Law, Computers & Technology, 9-10 https://www-tandfonline-com.uaccess.univie.ac.at/doi/pdf/10.1080/13600869.2013.869911?needAccess=true accessed 16.03.2026.
[117] Sven Schonhofen, 'Usedsoft and Its Aftermath: The Resale of Digital Content in The European Union', (2015) 16(2) Wake Forest Journal of Business and Intellectual Property Law, 277 https://assets.pubpub.org/wbs3y1ni/31662469731653.pdf accessed 16.03.2026.

3.1.3. Case C-174/15, Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht

The 2016 ruling by the Court of Justice of the European Union in VOB v Stichting Leenrecht (C-174/15) marks a significant turning point in European copyright law regarding whether libraries may lend e-books in a digital environment. The ruling clarified how Directive 2006/115/EC on rental and lending rights—known as the Rental and Lending Rights Directive—should be interpreted[118]. The Court's fundamental approach is that legal rules should not be interpreted solely with reference to the physical world, but must be assessed in light of technological developments and evolving social practices. Accordingly, the Court did not interpret the concept of "lending" in the directive narrowly as referring only to the borrowing of physical books from libraries; rather, it accepted that making digital books available to users under certain conditions may also fall within the scope of this concept.

In reaching this conclusion, the Court paid particular attention to the role of libraries within society. Libraries are not merely places where books are stored; they are also fundamental institutions for cultural transmission, education, and equal access to information. In an environment where digitalization is rapidly increasing, people's reading habits are also changing. If the law had been interpreted in a way that protected only the lending of physical books while completely excluding digital books, the public mission of libraries could have been seriously undermined. For this reason, the Court emphasized that the objective of the directive is to promote cultural circulation and that this objective must also be preserved in the digital environment.

[118] Case C-174/15 VOB v Stichting EU:C:2016:856, para. 27.

However, the Court also established certain technical and legal limits for e-book lending to be regarded as equivalent to traditional physical lending. According to the Court, the digital lending system must, in its operation, resemble the traditional lending model as closely as possible. For this reason, the Court stated that digital lending should function according to a "one copy – one user" principle. In other words, a single copy of an e-book held in a library's collection may be lent to only one user at a time. This system reflects the transfer of the logic of physical libraries into the digital environment: just as, in a library, a single physical copy of a book can only be read by one person at a time, a digital copy should be subject to the same limitation. In this way, digital lending does not amount to unlimited reproduction and distribution.

The second important point emphasized by the Court is that e-books made available through lending must not be permanently retained by the user. In physical lending, a book is returned to the library after a certain period; a similar mechanism must exist in digital lending. Accordingly, once the lending period expires, the user's access to the e-book must automatically terminate. This is typically ensured through technical systems such as digital rights management (DRM). In this way, the user cannot keep the book indefinitely, and digital lending does not produce the same effects as purchasing the book.

Another important aspect of the judgment is the emphasis that the e-book copies lent by libraries must be obtained from lawful sources[119].The Court explicitly stated that it is not acceptable for libraries to lend pirated or unlicensed digital copies. This requirement was introduced to protect the economic interests of copyright holders and to combat digital piracy[120]. Therefore, while

[119] Case C-174/15 VOB v Stichting EU:C:2016:856, para 68.
[120] ibid.

the judgment grants libraries a certain degree of freedom in digital lending, it also seeks to preserve the fundamental balance of the copyright system.

The practical consequence of this judgment is that it paves the way for EU Member States to establish a public lending regime for e-books as well. Under this system, authors and right holders do not have the power to completely prohibit libraries from lending their works; instead, they are entitled to receive fair remuneration in return for such use. In this way, the copyright system functions less as a mechanism of prohibition and more as one of balance and compensation. While libraries ensure public access to knowledge, authors are able to obtain a certain economic return from the public circulation of their works.

However, this judgment did not fully resolve the debates in digital copyright law. Indeed, in its later ruling in Tom Kabinet case, the Court of Justice of the European Union addressed the issue of the permanent downloading of e-books and classified such transactions not as “distribution” but as “communication to the public.”

This classification has significant implications, because in copyright law the principle of exhaustion generally applies to the distribution right. In the context of physical books, this principle allows a person who has purchased a book to resell it second-hand. However, since the Court classified e-book downloads as acts of communication to the public, it concluded that the exhaustion principle cannot be automatically applied in the digital environment.

In conclusion, the VOB judgment provided a legal basis for libraries to lend e-books in the digital age and recognized that digital lending can, under certain conditions, be treated within the framework of the traditional public lending regime. However, subsequent case law—particularly the Tom Kabinet case—has adopted a more restrictive approach regarding the free circulation of digital content and has limited the broad application of the principle of digital

exhaustion. Therefore, although the VOB judgment opened an important door for libraries, debates within European copyright law concerning the management of digital collections and the circulation of e-books are still ongoing.

3.1.4. Analysis of the VOB v. Stichting Leenrecht Case

Although the judgment of the Court of Justice of the European Union in Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht is, at first glance, considered an important gain for libraries, it is often described in academic literature as an incomplete revolution[121].The main reason for this is that, although the Court accepted e-book lending in principle, it did not secure the structural conditions necessary for libraries to implement this system in a truly effective manner[122]. The Court considered digital lending to be functionally equivalent to the lending of printed books, stating that e-books may also be lent by libraries under conditions such as the "one copy–one user" model and time-limited access[123]. However, at the same time, the Court did not explicitly recognize libraries' right to independently access or acquire the digital copies necessary to carry out this lending activity. As a result, in practice, libraries remain dependent on the commercial licensing systems offered by publishers. In other words, in order to lend a digital version of a book, libraries are often required to accept the conditions set by publishers, and these conditions can be highly restrictive in terms of pricing, duration of access, and the number of users[124].

One of the most debated aspects of the decision is the "legal basis" requirement[125]. The court has stated that digital copies lent out by libraries must have been obtained in accordance with

[121] Matteo Frigeri, Martin Kretschmer and Peter Mezei 'Copyright and elending in public libraries: an incomplete revolution?' (2024) 15(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 158, 172, 177, https://www.jipitec.eu/jipitec/article/view/400 accessed 16.03.2026.
[122] ibid, 156.
[123] Case C-174/15 VOB v Stichting EU:C:2016:856, para. 51-52.
[124] Frigeri, Kretschmer and Mezei (n 121) 157.
[125] ibid, 165, 172.

the law[126].At first glance, this requirement may seem like a reasonable measure to protect copyright holders, but in practice it creates a significant problem. This is because this approach does not allow libraries to digitize and lend books from their own physical collections. If a digital version of a book has been made available by the publisher, the library is often forced to purchase that version through a license. Thus, libraries cannot establish an independent e-book service by transferring their collections to a digital format; they can only offer content licensed by publishers. For this reason, some authors describe the library exception introduced by the VOB decision as a "legal chimera" in practice. Although a right appears to have been granted under the law, the ability to exercise that right depends on publishers' commercial decisions[127].

This issue became even more evident following the Tom Kabinet (C-263/18) ruling. In that ruling, the Court of Justice of the European Union classified the permanent downloading of e-books as communication to the public rather than distribution[128].The result of this classification is that the principle of first sale right, which applies to physical books, does not apply to digital books. A person who purchases a physical book can sell it secondhand or donate it to a library, because the distribution right is considered exhausted after the first sale. However, since this principle does not apply to digital books, a user cannot transfer the e-book they purchased to a library or have it enter the second-hand digital market. This situation severely limits libraries' methods of building collections and further strengthens publishers' control over the digital content market[129].

[126] Case C-174/15 VOB v Stichting EU:C:2016:856, para 72.
[127] Frigeri, Kretschmer and Mezei (n 121) 170.
[128] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111, para 72.
[129] Frigeri, Kretschmer and Mezei (n 121) 179.

3.1.5. Case C-263/18, Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others

The European Court of Justice's Tom Kabinet (C-263/18) ruling marks a significant turning point in European Union law regarding whether the resale of digital works is permissible. The ruling has clarified the legal debates that have arisen, particularly regarding how the online resale of e-books should be assessed under copyright law. The decision also addressed the question of whether the "digital exhaustion" approach, which was established in the UsedSoft case regarding computer programs, can be applied to other types of digital works.

The dispute arose from the activities of an online platform called Tom Kabinet, which operates in the Netherlands. Tom Kabinet has created a platform that allows users to sell or donate e-books they previously purchased online to other users through a system called "Tom's Reading Club". The system operates on a principle similar to that of a second-hand book market. Users upload the e-books they own to the platform, and these books can then be sold to other users. The platform has also attempted to implement certain technical and contractual measures specifying that e-books can only be transferred once and that the original user must delete their own copy. Tom Kabinet has argued that this model is legally permissible and should be evaluated similarly to the sale of second-hand books.

However, Dutch publishers and publishing associations, particularly the Nederlandse Uitgeversverbond (NUV) and the Groep Algemene Uitgevers (GAU), have filed a lawsuit claiming that this system infringes on the copyright holders' rights. The publishers argued that the resale of e-books online seriously undermines the economic rights of copyright holders and could lead to the creation of an unrestricted second-hand market in the digital environment. During the proceedings, the Dutch court concluded that the dispute required an interpretation

of European Union law and referred the matter to the Court of Justice of the European Union for a preliminary ruling.

At the heart of the dispute lies the question of which copyright provision should govern the practice of making e-books available to users by downloading them from the internet[130]. At this point, two different possibilities arise. If the provision of e-books to users is considered an act of distribution, the distribution right is exhausted upon the first sale, and the resale of the e-book in question becomes legally permissible. Conversely, if this process is deemed an act of communication to the public, the right does not exhaust, and therefore, a second-hand sale cannot be made without the rights holder's permission. Consequently, the resolution of the dispute depends largely on determining the legal nature of e-books.

In its ruling, the Court of Justice of the European Union held that making e-books available to users via the internet constitutes a communication to the public rather than an act of distribution[131].According to the Divan, making e-books available for download over the internet constitutes a communication activity that grants access to the work to a specific or unspecified number of users. Therefore, this activity should be assessed within the scope of the right of communication to the public as regulated in the Information Society Directive[132]. Unlike the right of public communication, the right of distribution is not subject to the principle of exhaustion. Therefore, the rights holder must grant separate permission for the resale of an e-book over the internet.

In its ruling, the court specifically noted that digital works possess characteristics distinct from those of physical works[133].Printed books wear out, age, and lose value over time. In contrast,

[130] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111, para 33.
[131] ibid, para 65.
[132] ibid, para 69.
[133] ibid, para 58.

digital works retain their original qualities and do not suffer any loss of quality. For this reason, a used e-book retains exactly the same value as a new one[134]. In addition, transferring digital works is extremely fast and easy; an e-book can be transferred to another user in a matter of seconds[135]. This situation will ultimately facilitate piracy, leading to the rapid growth of the second-hand e-book market and causing serious harm to the economic interests of copyright holders[136].

The court also explicitly stated that the approach adopted in the UsedSoft decision cannot be applied to e-books[137].The primary reason for recognizing digital exhaustion for computer programs in the UsedSoft decision is that computer programs are subject to a special legal regime under the Computer Programs Directive. In contrast, works such as e-books are subject to general copyright law rules, and the principle of digital exhaustion has not been recognized under these rules. Consequently, it has not been deemed possible to extend the exceptional approach applied to computer programs to other types of digital content[138].

The court's decision also refers to the provisions of the Information Society Directive and the WIPO Copyright Treaty (WCT). These regulations state that the right of distribution applies primarily to copies of works fixed on a tangible medium[139]. Conversely, it has been accepted that digital transmissions made over the internet constitute a service and should be evaluated within the scope of the right of public communication. For this reason, it has not been deemed possible for e-books offered in a digital environment to benefit from the principle of exhaustion.

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[134] ibid.

[135] Ansgar Kaiser, 'Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C-263/18 –Tom Kabinet on E-Books and Beyond' (2020) 69(5) GRUR International, 492 https://www.researchgate.net/publication/342017568_Exhaustion_Distribution_and_Communication_to_the_Public_-_The_CJEU's_Decision_C-26318_-_Tom_Kabinet_on_E-Books_and_Beyond accessed 16.03.2026.

[136] Sganga (n 94) 212.

[137] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111, para 59.

[138] ibid.

[139] ibid, para 46-52.

In conclusion, the Court of Justice of the European Union found that the activities carried out by the Tom Kabinet platform infringed upon copyright holders' right of communication to the public and ruled that the resale of e-books online is not permitted without the rights holder's consent. With this decision, the scope of digital exhaustion under European Union law has been significantly limited. The UsedSoft decision has clearly established that the approach to digital exhaustion accepted for computer programs cannot be applied to other types of digital works, such as music, films, or e-books. Thus, the Court of Justice of the European Union has acknowledged the need for a clear distinction between computer programs and other types of works regarding the legal regime of digital content and has clarified the boundaries regarding the resale of works in the digital environment.

3.1.6. Analysis of Tom Kabinet Case

Criticism of the Tom Kabinet ruling centers on the fact that the court's rejection of the principle of exhaustion with respect to digital works raises both economic and legal concerns. The Court of Justice of the European Union concluded that the principle of exhaustion could not be applied, as it classified the online resale of e-books as a form of communication to the public. However, many scholars in the legal literature argue that this approach does not fully align with the economic realities of digital works and consumer expectations. In particular, the court's decision to treat the distinction between physical and digital copies as a decisive criterion has drawn criticism in certain respects.

The court's ruling cited the difference between the natural wear and tear of printed books over time—and their consequent loss of value—and the fact that e-books do not physically deteriorate as a key justification[140].Accordingly, since a used e-book possesses the same quality

[140] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111, para 58.

as a new one, the emergence of a second-hand market in the digital environment could cause serious harm to the economic interests of copyright holders. However, legal scholars argue that this approach considers only the physical condition of the work, while failing to sufficiently account for the fact that the work's economic value may change over time[141]. Indeed, many types of works may lose their value over time in terms of content, even if they remain physically intact. Books published in fields such as law, medicine, or engineering, in particular, can quickly become outdated due to changes in legislation, scientific advancements, or new research. For example, a law book containing the text of a repealed law or a medical book that has lost its relevance loses much of its economic value, even if it is in mint condition. For this reason, attributing the economic life of a work solely to physical wear and tear does not adequately reflect the true economic life cycle of digital works. From this perspective, it has been argued that e-books may lose economic value over time and, in this respect, share characteristics similar to computer programs as assessed by the court in the UsedSoft decision. Software can also become obsolete over time due to technical advancements and the release of new versions, thereby losing its functional value. Consequently, the absence of physical wear and tear is not considered a sufficient justification on its own to reject the concept of digital obsolescence[142].

Another significant criticism directed at the Tom Kabinet ruling concerns consumer expectations and the intended purpose of the work. From a consumer's perspective, there is often no functional difference between purchasing a printed copy of a book and downloading a digital copy of the same book from the internet[143]. In both cases, the user benefits from the book's content and reads the work. Nevertheless, while a user who purchases a physical book

[141] Mustafa Aksu, 'İnternet Üzerinden Yayılan Eserlerde Tükenme İlkesi? Dijital Tükenme İlkesi?', (2016) Journal of Commercial and Intellectual Property Law, 18 https://dergipark.org.tr/tr/download/article-file/270561 accessed 01.03.2026.
[142] ibid.
[143] ibid.

has the option to later transfer their copy to someone else or sell it secondhand, a user who purchases a digital book is completely deprived of such rights. Yet, for digital works, the price paid is often quite close to that of physical books. This situation has led to criticism that the balance between the price paid by the consumer and the rights they obtain has been disrupted[144]. The fact that a distribution method is either physical or digital should not give the copyright holder the ability to circumvent the first-sale doctrine and control the circulation of the work indefinitely. Otherwise, rights holders could completely eliminate the secondary market by making their works available exclusively in digital form, thereby undermining the fundamental purpose of the first-sale doctrine.

Although it has been argued that the second-hand digital market could fuel piracy and harm the economic interests of copyright holders due to the ability to copy digital works indefinitely without any loss of quality[145], certain counterarguments have been put forward in legal doctrine. Accordingly, through technical systems such as "forward-and-delete," it is possible to ensure that the original copy is automatically deleted when a digital file is transferred, thereby ensuring that only a single copy exists at any given time. Furthermore, according to some authors, digital scarcity may actually reduce piracy rather than encourage it; because the existence of a secondary market can reduce users' need to turn to pirated copies[146].

One of the most notable criticisms leveled against the decision concerns the discrepancy between the approach adopted by the Court of Justice of the European Union regarding computer programs in the UsedSoft case and the approach taken in the Tom Kabinet case. In the UsedSoft case, the Court assessed the provision of computer programs to users via download over the internet as an economic sale and accepted that the right of distribution could

[144] ibid.
[145] Sganga (n 94) 212.
[146] Aksu (n 141) 18.

be exhausted in such cases. In contrast, in the Tom Kabinet case, the provision of e-books over the internet was assessed as communication to the public, leading to the conclusion that the exhaustion principle could not be applied[147]. However, from a technical perspective, both computer programs and e-books consist of digital data packages, and both are downloaded via the internet. Furthermore, in both cases, users typically pay a one-time fee to gain the right to use the work indefinitely. For this reason, some authors argue that the distinction drawn between computer programs and e-books is artificial and that applying different legal regimes to transactions that produce similar economic outcomes could create issues regarding legal certainty[148].

In conclusion, the Tom Kabinet decision established a precedent that significantly narrows the scope of the principle of digital exhaustion under European Union law. The decision held that, with regard to works distributed in a digital environment, the principle of exhaustion applies only to computer programs, while the resale of other types of digital content—such as e-books, musical works, or films—over the internet is subject to the rights holder's consent. However, it is evident that the decision has been subject to various criticisms in legal doctrine regarding economic realities, technological advancements, and consumer expectations. These debates demonstrate that the question of how intellectual property law should strike a balance between the rights of copyright holders and the public's freedom of access to information remains as relevant as ever in the digital age.

3.2.Digital Exhaustion in Turkish Law

The advancement of computer technologies, particularly the internet, has raised the question of whether the principle of exhaustion applies to works made available in the digital

[147] Case C-263/18 NUV v Tom Kabinet EU:C:2019:1111, paras 53-57.
[148] Aksu (n 141) 17.

environment[149].As a result, differing views have been expressed regarding whether the presentation of computer programs or other types of works on the internet or via a data carrier is subject to the principle of exhaustion. There is no doubt that there is general agreement on the fact that a work for which physical copies exist may be subject to the right of distribution[150].The point of contention is whether works that have not yet taken material form can be subject to the right of distribution. To consider the various possibilities: first, it is generally accepted that works acquired in a form loaded onto a medium are subject to the principle of exhaustion[151]. However, the issue of whether a work may be transferred separately from its medium, even though it was acquired together with the medium, has been the subject of debate in a case brought before the Supreme Court[152]. The court ruled that "since Article 16 of the OEM license agreement, which prohibits the resale of the computer program, is invalid in light of the mandatory provision of Article 23(2) of Law No. 5846 on Intellectual and Artistic Works, all of the defendant's counsel's grounds for appeal are without merit".

According to one view, Article 23(1) of the FSEK, which provides that "the right to rent, lend, offer for sale, or otherwise distribute the original or copies of a work belongs exclusively to the author," is also applicable to acts of distribution such as renting, lending, or offering for sale in the online environment[153]. According to a similar view, the sharing of a work on the internet by a third party without the author's permission constitutes an infringement of the right of distribution[154]. According to the opposing view, making a work available on the internet has not been regarded as an exercise of the right of distribution within the meaning of Article 23 of

[149] R.Anthony Reese (n 19) 581.
[150] Merdivan, Yavuz and Alıca (n 5) 967.
[151] Aksu (n 141) 2.
[152] Turkish Court of Cassation, 11th Civil Chamber, Case No. E. 2014/17376, Decision No. K. 2015/8772, 30 June 2015, Court of Cassation Decision Search Database accessed 04.03.2026.
[153] Yavuz Kaplan, *İnternet Ortamında Fikrî Hakların Korunmasına Uygulanacak Hukuk*, (Seçkin Publishing 2004) 133.
[154] Şebnem Akipek, Esra Dardağan, 'Sanal Ortamda Telif Hakları', (2001) 21(1) Journal of the Research Institute for Banking and Commercial Law, 59 https://www.jurix.com.tr/article/6006?u=0&c=0 accessed 01.01.2026.

the FSEK, and it has been accepted that acts carried out in the online environment cannot be characterized as distribution[155]. In this respect, it has been argued that, on the grounds that the right of distribution can only be exercised over tangible copies, Article 23 of the Law cannot be applied to intangible digital copies[156]. Consequently, while the distribution of the original or tangible copies of a work falls within the scope of the right of distribution, the making available of the work in an intangible digital form is to be assessed within the scope of the right of communication to the public (FSEK Art. 25/2)[157]. However, due to Türkiye's efforts to harmonize with the European Union acquis, following the UsedSoft decision, Turkish courts have referred to this case law in their judgments assessing the principle of exhaustion in relation to digital works. Below, the Verisil decision[158], recently rendered in Turkish law and addressing the principle of exhaustion in relation to digital works, will be examined.

3.2.1. Case No. 2011/96 (Decision No. 2014/117), Verisil Bilgisayar Elektronik İletişim Tek. ve Yay. Dış Tic. Ltd. Şti. v Microsoft Corporation

The case heard under file number 2011/96 before the Istanbul 1st Intellectual and Industrial Property Court is regarded as one of the most significant judicial decisions in Türkiye concerning the resale of computer software. The parties to the dispute are Verisil Bilgisayar Elektronik İletişim Teknolojileri ve Yayıncılık Dış Ticaret Ltd. Şti., engaged in the trade of second-hand software, and the software producer Microsoft Corporation. The dispute centers on whether original software placed on the market by Microsoft—particularly in relation to OEM licences—may be resold as second-hand, and whether the transfer of such software separately from the computer on which it was initially installed constitutes an infringement of

[155] Merdivan, Yavuz and Alıca (n 5) 962.
[156] Savaş Bozbel, *Fikri Mülkiyet Hukuku* (Onikilevha Publishing 2015), 81; Azra Arkan Serim, *Yayım Sözleşmesinin Hukuki Nitelikleri ve Tarafların Yükümlülükleri* (Legal Publishing 2017), 14.
[157] Bozbel (n 156) 81.
[158] Istanbul 1st Intellectual and Industrial Property Rights Civil Court, E. 2011/96, K. 2014/117.

copyright. The case was initiated following a search conducted at the claimant company's premises upon a complaint by Microsoft, during which certificates of authenticity (COA), recovery CDs, and user manuals belonging to various Microsoft software products were seized. Microsoft argued that the separation of these products from the computer hardware and their independent resale was contrary to the licence agreements and constituted an infringement of copyright. The claimant, Verisil, on the other hand, contended that its activities were entirely lawful, that all products in circulation were original Microsoft software, and that the software in question had been lawfully acquired by the initial users and subsequently resold as second-hand. According to the claimant, no reproduction of the software occurred in this process; rather, only an existing copy changed hands, and therefore no infringement of copyright arose. In its defence, Microsoft argued that ownership of the software products had not been transferred; rather, only a right of use had been licensed under specific conditions. In particular, under the provisions of OEM licence agreements, it was asserted that the software could only be transferred together with the licensed computer and that it was not possible to transfer the software independently from the hardware. According to Microsoft, the OEM licensing model constitutes a special distribution channel that enables software to be offered on the market at a lower price, and separating the software from the computer and turning it into an independent commercial product amounts to a breach of the licence agreement. In order to strengthen its defence, Microsoft also referred to U.S. law and decisions of U.S. courts. In this context, attention was drawn to the limitations imposed on the resale of digital content under the "first sale doctrine" as applied in American law, with particular reference to the case of Capitol Records v. ReDigi and similar decisions. It has been stated in these decisions that the transfer of digitally acquired content as second-hand constitutes an infringement of copyright. According to Microsoft, software licences should be assessed in a similar manner, since the software is not sold to the user but merely licensed for use. Therefore, the transfer of the licence

should only be possible within the framework of the conditions set out in the licence agreement. In assessing Microsoft's defence based on U.S. law, the court emphasized that the American legal system differs significantly from the continental European legal system. An examination of the historical development of Turkish intellectual property law reveals that the Law on Intellectual and Artistic Works has been largely influenced by German law and is grounded in the continental European legal tradition. Therefore, it was stated that case law based on the Anglo-American legal system does not constitute directly applicable precedent for Turkish law. The court also drew attention to Türkiye's legal relationship with the European Union. Türkiye's status as a candidate country and its obligation to harmonize its national legislation with the EU acquis within the framework of the accession process played a significant role in the court's assessment. The harmonization programs carried out in this context require not only legislative amendments but also the development of legal practice in conformity with European Union law. This, in turn, necessitates that judicial case law evolve in parallel with EU law.

Accordingly, the court concluded that, in assessing the dispute, it would be more appropriate to rely on principles recognized under European Union law and the case law of the Court of Justice of the European Union, rather than on American law. At this point, the court also examined in detail the legal nature of computer programs. Pursuant to Article 1/B of the Law on Intellectual and Artistic Works, computer programs are protected as works of science and literature. However, the legal protection afforded to software is independent of the computer hardware and is directed at the sequence of commands constituting the software itself. For this reason, it was accepted that software can technically be separated from the computer and that its legal fate is not dependent on the hardware. The fundamental principle determining the resolution of the dispute is the principle of exhaustion. Pursuant to Article 23 of the Law on Intellectual and Artistic Works, once a copy of a work has been placed on the market with the authorization of the right holder, the right of distribution over that copy is exhausted. In other words, after the

first sale of a particular copy of the work, the right holder can no longer prevent its subsequent transfers. The court held that the software produced by Microsoft enters commercial circulation at the moment it is delivered to hardware manufacturers or end users through licence agreements, and that the right of distribution is exhausted at that stage. Accordingly, it was concluded that, provided the software has been lawfully acquired by the initial user, its subsequent transfer to third parties does not constitute an infringement of copyright. The court also examined the provision in Microsoft's licence agreements stating that "the software may only be transferred together with the licensed computer." According to the court, this provision does not serve the protection of copyright but rather constitutes a commercial restriction determining the manner in which the software is marketed. Although the purpose of intellectual property law is to protect the right holder, such protection cannot be interpreted in a way that undermines the principles of free competition and trade. The contractual clause prohibiting the transfer of software independently from the computer was therefore regarded not as a means of protecting intellectual property rights, but as an attempt to control the secondary market for software. In its assessment, the court also relied on principles recognized under European Union law and the case law of the Court of Justice of the European Union. In particular, it took into account the evolving EU case law concerning the resale of software licences and emphasized that the principle of exhaustion is decisive in determining the limits of intellectual property rights. This approach is consistent with the reasoning set out by the Court of Justice of the European Union in UsedSoft v Oracle (C-128/11). In that judgment, it was held that there is no difference, for the purposes of the exhaustion doctrine, between software distributed via internet download and software distributed on a physical data carrier; once the software has been placed on the market for the first time with the consent of the right holder, the right of distribution is exhausted, and subsequent transfers of that copy cannot be prevented.

As a result of these assessments, the Istanbul 1st Intellectual and Industrial Property Court held that the resale of original software placed on the market by Microsoft does not constitute an infringement of copyright. According to the court, once the software has been sold for the first time, the right of distribution is exhausted, and the right holder can no longer prevent subsequent transfers of that copy. It was further stated that the provisions in OEM licence agreements prohibiting the transfer of software independently from the computer cannot be regarded as valid in the face of the mandatory principle of exhaustion regulated under the Law on Intellectual and Artistic Works.

This decision of the court of first instance was appealed by Microsoft and brought before the 11th Civil Chamber of the Court of Cassation. The Court of Cassation examined the reasoning of the lower court as well as the expert reports in the case file and, in particular, emphasized the mandatory nature of the principle of exhaustion set out in Article 23(2) of the FSEK. In this context, it was held that the prohibition on second-hand sales contained in OEM licence agreements cannot override the principle of exhaustion established by law, and the decision of the lower court was found to be in accordance with both procedural and substantive law. Accordingly, the 11th Civil Chamber of the Court of Cassation upheld the judgment of the lower court unanimously with its decision numbered 2015/8772.

In conclusion, when these decisions are considered together, they establish an important line of case law in Turkish law affirming that original software may be transferred as second-hand and that contractual restrictions imposed by software producers cannot override the mandatory principle of exhaustion. Thus, once software has been placed on the market for the first time with the consent of the right holder, the right of distribution over that copy is deemed to be exhausted, and subsequent transfers do not constitute copyright infringement. This decision

represents a significant turning point in Turkish intellectual property law practice in determining the legal status of the secondary market for software licences.

3.2.2. Analysis of Verisil Case

It is observed that various criticisms have been raised in the doctrine regarding this decision. In particular, some scholars do not find it appropriate that Turkish courts, in the Verisil decision, adopted an approach allowing digital exhaustion or the independent resale of OEM licences by relying on the Court of Justice of the European Union's judgment in UsedSoft v Oracle as a precedent. The first of these criticisms is based on the fact that, in the concrete case, the computer program was not transferred entirely through an online transmission but rather delivered on a physical CD. According to this view, since there was no direct digital transmission, it is not accurate to consider the decision as an example demonstrating the principle of "digital exhaustion."[159]. In the same vein, a second line of criticism concerns the differences between the normative framework underlying this case law in European Union law and the systematic structure of Turkish law. Indeed, within EU law, rules relating to computer programs are governed by a specific instrument, namely the Computer Programs Directive, and the fact that this special regulation prevails over the Information Society Directive constitutes the legal basis of the UsedSoft judgment[160].In contrast, under Turkish law, it is noted that there is no separate specific regulation concerning the principle of exhaustion for computer programs within the scope of the Law on Intellectual and Artistic Works; rather, exhaustion is regulated uniformly for all types of works under Article 23[161]. Another line of criticism concerns the legal characterization of transactions carried out in the digital environment. According to this view,

[159] Mustafa Aksu, 'Bilgisayar Programları Açısından Fikir ve Sanat Eserleri Hukukunda Yayma Hakkının Tükenmesi ve Yargıtay 11. Hukuk Dairesinin Verisil Versus Microsoft Kararı (OEM Kararı) Üzerine Düşünceler', (2016) 15(2) Istanbul Kültür University Journal of the Faculty of Law, 153-154 https://www.jurix.com.tr/article/5585?u=0&c=0 accessed 01.02.2026.
[160] Akıncı (n 87) 141.
[161] ibid.

transmissions conducted online should be assessed under the right of communication to the public pursuant to Article 25(2) of the FSEK, and since the right of communication to the public is not subject to exhaustion under Article 25(3) of the FSEK, the principle of exhaustion should not apply to such transactions[162]. For this reason, it is argued that subjecting software sales carried out in the digital environment to the principle of exhaustion is incompatible with the systematic structure of the law. Finally, some scholars contend that, since the relationship between special and general norms among EU directives does not exist in Turkish law, relying on the UsedSoft judgment as a precedent in Turkish law is methodologically flawed. Accordingly, they maintain that the VeriSil decision lacks a convincing legal basis in light of the arguments advanced in the doctrine[163].

In my view, however, it is not possible to agree with these criticisms. First of all, as noted above, it cannot be argued that there is a substantial difference, in terms of the economic benefit obtained by the right holder, between the delivery of a computer program via a physical medium and its download over the internet. In both cases, the user acquires a copy of the program in exchange for a certain fee and obtains the right to use that copy indefinitely. Therefore, rather than focusing solely on the mode of transmission, it would be more consistent to base the legal assessment on the economic and functional nature of the transaction. Indeed, attributing different legal consequences to the same economic transaction merely because of a difference in the technical method of delivery is incompatible both with market realities and with the fundamental purpose of the principle of exhaustion. In this context, the fact that the transfer of a copy of a computer program—against payment and with the grant of a perpetual right of use—is labelled as a "licence" does not, in itself, alter the legal nature of the transaction. What is decisive is whether effective control over the copy has been transferred to the user. In situations

[162] ibid.
[163] ibid.

where the user acquires the ability to use the program indefinitely and to exercise de facto control over it, the transaction should, in its economic and legal substance, be regarded as akin to a sale. In such cases, allowing the right holder to continue exercising ongoing control over the same copy after the initial transfer would be incompatible with the core function of the exhaustion principle. Moreover, within the framework of Türkiye's relations with the European Union, the obligation undertaken to harmonize its intellectual property legislation with EU standards should not be overlooked. Indeed, under Decision No. 1/95 of the EC–Turkey Association Council, Türkiye has committed to approximating its laws with the EU acquis in the field of intellectual property. In this context, although the settled case law of the Court of Justice of the European Union is not directly binding on Turkish courts, it clearly constitutes a strong interpretative source.

Accordingly, rather than being entirely disregarded in Turkish law, the UsedSoft judgment should be considered as a guiding reference in the process of interpretation, particularly in light of the economic and technical characteristics of computer programs. An alternative approach would risk isolating Turkish law from international developments in the face of the global nature of the software market and could lead to significant inconsistencies in practice.

On the other hand, the principle of exhaustion serves not only to protect the interests of individual users but also to preserve the balance of competition in the market. Through this principle, the right holder's control over a particular copy does not continue indefinitely after the first sale, thereby ensuring the free circulation of goods. If software producers were considered to have the authority to prevent the resale of the same copy even after the first sale, this could lead to the elimination of secondary markets and enable right holders to obtain a de facto unlimited monopoly. However, the principle of exhaustion was developed precisely to prevent such outcomes and to ensure that the economic consideration obtained from the first

sale is deemed sufficient for the right holder. For this reason, allowing software copies to be transferred within the second-hand market appears to be more consistent both with economic reality and with the balancing function of intellectual property law.

Finally, the possibility that the same copy may continue to be used simultaneously by both the seller and the buyer in second-hand software transactions should not be regarded as a justification for rejecting the principle of exhaustion. Today, such risks can be significantly mitigated through technological means such as digital rights management systems, deactivation of licence keys, online verification mechanisms, and similar tools. Therefore, the existence of risks that are technically manageable does not justify disregarding the legal principle as a whole. At this point, the appropriate solution is not to deny the application of the exhaustion principle, but rather to ensure that right holders employ appropriate technical measures to prevent the simultaneous use of the same copy.

When all these considerations are taken together, it can be said that the VeriSil decision reflects a broader perspective that goes beyond a narrow interpretation based solely on the wording of the law, taking into account the economic realities of the software market, competitive balance, and consumer interests. For this reason, rather than being entirely unfounded in light of the criticisms raised in the doctrine, this approach may be regarded as an interpretation aligned with the evolving direction of contemporary intellectual property law.

CONCLUSION

The right of distribution and the principle of exhaustion arising from this right in Turkish law and European Union law are based, to a large extent, on similar theoretical foundations. In both legal systems, the right of distribution—one of the economic rights of the author—grants the author an exclusive authority over the placing on the market and distribution of copies of the work. However, this right is not absolute; once specific copies of the work are put on the market with the consent of the right holder, the right of distribution in respect of those copies is considered to be exhausted. In this way, a balance is sought between the monopoly conferred by intellectual property rights and the principles of free movement of goods and the protection of competition.

In Turkish law, the principle of exhaustion is regulated under Article 23 of the Law No. 5846 on Intellectual and Artistic Works and is applied in the form of national exhaustion. Accordingly, when specific copies of a work are first placed on the market in Türkiye with the consent of the right holder, the right of distribution over those particular copies is exhausted, and their subsequent resale is no longer subject to the author's authorization. In European Union law, by contrast, the principle of exhaustion has a regional character. Once a copy of a work is first placed on the market within the European Union or the European Economic Area with the consent of the right holder, the right of distribution is deemed to be exhausted throughout the Union, thereby allowing the free circulation of those copies among Member States. In this respect, EU law adopts a more integrated approach, based on the functioning of the internal market and the free movement of goods.

Nevertheless, in both Turkish law and European Union law, the principle of exhaustion does not eliminate all economic rights of the author. In particular, the rights of rental and public lending are preserved independently of the sale. In Turkish law, this is expressly stated in

Article 23 of the FSEK, according to which the sale of a copy of a work does not result in the complete transfer of the author's rights of rental and public lending. Similarly, under European Union law, pursuant to Directive 2006/115 on rental and lending rights, these rights are not affected by the exhaustion of the distribution right. In this regard, it can be said that there is a significant parallelism between the two legal systems.

The applicability of the principle of exhaustion in the digital environment has been widely debated in both doctrine and case law, particularly with regard to software works. In the judgment of the Court of Justice of the European Union in UsedSoft v Oracle, it was accepted that granting a user a perpetual right to use a computer program downloaded from the internet is, from an economic perspective, equivalent to a sale, and therefore the right of distribution is exhausted upon the conclusion of the first licence agreement. The Court further emphasized that limiting exhaustion solely to physical copies would allow the right holder to control the secondary market through digital distribution. This decision is regarded as one of the most significant precedents recognizing the principle of digital exhaustion in the field of software.

In Turkish law, the VeriSil decision may be cited as a noteworthy example in this respect. The Istanbul 1st Intellectual and Industrial Property Court held, in a dispute concerning the resale of second-hand software licences, that the right of distribution is exhausted once the computer program has been placed on the market for the first time with the consent of the right holder, and that the subsequent resale of such software does not constitute copyright infringement. The court also referred to the UsedSoft judgment of the Court of Justice of the European Union and stated that, following the initial placement of the software on the market through the first licence agreement, the right holder can no longer maintain exclusive control over its distribution. This approach is significant in demonstrating that Turkish courts take EU case law into account when addressing the issue of exhaustion in the digital environment.

By contrast, in its Tom Kabinet judgment, the Court of Justice of the European Union held that the principle of digital exhaustion does not apply to e-books. However, in our view, this approach is open to criticism in several respects. First, the fact that digital works do not physically deteriorate does not mean that their economic value remains unchanged. Many types of works—such as scientific publications, legal texts, or technical manuals—become outdated over time in terms of content and consequently lose their economic value. In this respect, e-books follow an economic cycle similar to that of software, which may lose its functionality over time due to technological developments.

Furthermore, from the consumer's perspective, there is no functional difference between purchasing a physical copy of a work and downloading a digital copy; in both cases, the purpose is to benefit from the content of the work. Nevertheless, depriving users who purchase digital copies entirely of the ability to transfer them may disrupt the balance of interests between users and right holders. In addition, with the aid of technical solutions such as "forward-and-delete" mechanisms, it is possible to ensure that a digital file is deleted from the transferor's system at the moment of transfer, thereby limiting concerns regarding uncontrolled reproduction of digital works.

Finally, the complete rejection of the principle of digital exhaustion carries the risk of enabling right holders to entirely prevent secondary markets, thereby creating a strong monopoly in the digital content market. Such a situation may hinder the dissemination of information to wider audiences under more accessible conditions and weaken the balance that intellectual property law is intended to establish in favor of the public interest.

When the UsedSoft and Tom Kabinet judgments of the Court of Justice of the European Union are considered together, a certain legal inconsistency emerges with regard to the application of the principle of digital exhaustion. In UsedSoft, the Court accepted that granting a perpetual

right of use for computer programs downloaded via the internet is economically equivalent to a sale and concluded that the right holder's distribution right is therefore exhausted. By contrast, in Tom Kabinet, the Court reached a different conclusion for e-books—digital content of a similar nature—and held that their transfer falls within the scope of the right of communication to the public, thereby excluding the application of the exhaustion principle. However, in both cases, what is at issue is the downloading of digital data packages via the internet and their acquisition by users for permanent use. From this perspective, the distinction drawn between software and e-books appears rather limited in terms of economic and functional reality, and the application of different legal regimes to transactions producing similar outcomes may create problems in terms of legal certainty.

For this reason, it would be more appropriate to resolve the legal inconsistency between the UsedSoft and Tom Kabinet decisions and to extend the digital exhaustion approach adopted for software to other types of digital content, such as e-books. Such an approach would both strengthen the balance between the protection afforded by intellectual property rights and the freedom of competition and enhance legal predictability in the digital content market. Particularly for Türkiye, which is in the process of harmonizing its legal framework with that of the European Union, it is important that this debate is not confined to narrow interpretations, but rather contributes to eliminating uncertainties that may arise in practice regarding the transfer of digital works.

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