

Kluwer Copyright Blog

The Dutch courts apply UsedSoft to the resale of eBooks

Saba Sluiter · Wednesday, January 28th, 2015



On 20 January, the Dutch court of appeals (Hof Amsterdam) gave its preliminary ruling in the case of [Tom Kabinet](#). In this ruling the court had to consider whether the CJEU UsedSoft rationale applies to eBooks as well. Without giving a final judgment, the court indicated that it considers it quite likely that exhaustion of rights, as described in art 4(2) of the [Infosoc Directive](#), also applies to intangible goods, such as eBooks.

Tom Kabinet, a Dutch company, started a business in ‘used’ eBooks. The owner of an eBook can sell his copy through the website of Tom Kabinet. In order to sell used eBooks, the owner needs to declare that he obtained the copy legally, by agreeing to Tom Kabinet’s standard terms. He will also have to declare that he will delete his own copy. Tom Kabinet does not have any means of checking that these statements are correct, but the company does add a code to the uploaded copy. This makes the copy traceable, so Tom Kabinet can prevent the same copy being uploaded twice. Tom Kabinet argued that the CJEU’s ruling in the [UsedSoft](#) case extends to eBooks and therefore their practice is legal.

The Dutch Association of Publishers demanded that Tom Kabinet stop facilitating the resale of eBooks. They argued that eBooks are not resalable, since they are intangible goods. The court of first instance ruled in favour of [Tom Kabinet](#). However, the Court of Appeal ruled that the website must be shut down, because it also allows for the sale of illegally obtained copies. If Tom Kabinet employed a system that prevents the uploading of illegally downloaded works, it could continue its business.

The court considered whether the ruling in UsedSoft could be applicable here. It did not give a final statement on this, but it showed a strong tendency towards treating the eBooks in a similar way to paper books (or software for that matter).

The court stated that it is unclear from the ruling in *UsedSoft* whether the exhaustion of rights extends to eBooks. It stated that the owner of an eBook receives a right to use the copy for an unlimited time in return for paying a price that represents the economic value of the copy of the work – just as in *UsedSoft*. On the other hand, the court stated that recitals 28 and 29 of the *Infosoc Directive* indicate that article 4(2) of the directive is only applicable to tangible goods. Further, the court pointed out that the special provision in article 5(1) of the [Software Directive](#), allowing the reproduction of the work for this purpose, does not apply to copyright in general.

These arguments against the possibility of exhaustion did not compel the court to forbid the resale of eBooks. In addition, the CJEU has taken an economic approach in *UsedSoft*, by pointing towards the practical similarities between tangible and intangible goods combined with the fact that the right holder has received appropriate remuneration at the first sale. In light of this, the court took into account the possibility that the practice of Tom Kabinet is allowed under European Law. The court ruled that Tom Kabinet cannot be ordered to close the website in summary proceedings, because it is too uncertain that a court in substantive proceedings would order Tom Kabinet to cease and desist its activities. In doing so, the court leaves the question unanswered as to whether Tom Kabinet's business of reselling eBooks is allowed under European Law or not. Despite this uncertainty, it did not deem it necessary to refer questions to the CJEU, since it was only asked to rule in summary proceedings.

From a procedural perspective, this conclusion seems only fair. In summary proceedings, the court is not allowed to take measures that would not be expected to be the outcome of the substantive proceedings. Taking this into account, the court expects there to be digital exhaustion of rights within the European Union, or at least expects that the CJEU will come to this conclusion. The court pointed out that the CJEU had left the question unanswered as to what extent *UsedSoft* is applicable here. It then continued by suggesting that it would be in line with other CJEU rulings to allow the resale of intangible goods.

In March 2013 the German Landgericht ruled that article 4(2) of the *Infosoc Directive* is not applicable to downloads (Case No 4 O 191/11, Landgericht (German Regional Court) Bielefeld, 5 March 2013). The German court ruled that *UsedSoft* is not applicable to eBooks, since those are not covered by the *Software Directive*. However, the Dutch court has now reached the opposite conclusion. The different outcomes in these two member states illustrate that a CJEU ruling on this matter would be welcome.

In the end, Tom Kabinet was ordered to stop facilitating the resale of eBooks, because by doing so, it is facilitating the trade in illegal copies. Once Tom Kabinet has found a way to prevent this, it can ask the court to allow them to start their business again. So for the time being, under Dutch law, article 4(2) of the *Infosoc Directive* applies to eBooks too.

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