

The legal status of second hand game sales in the European Union

A game changer for the games industry?



In a much-discussed decision published on July 3rd, 2012, the Court of Justice of the European Union (CJEU) ruled that consumers may resell digital and physical software (*Oracle v UsedSoft*, case C-128/11). Boiled down to this simple result, the decision sounds like a revolution – but is it?

The focus of the case was an application of the doctrine of exhaustion or 'first sale' to games sales. This doctrine is not new: it has been part of copyright laws in the EU for decades and is explicitly contained in the InfoSoc Directive (2001/29/EC) and the Computer Programs Directive (2009/24/EC). For example, Article 4 (2) of the Computer Program Directive states: "*The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof*".

Essentially this means that EU copyright laws give rights holders the exclusive right to control sales of the original and each and every individual copy of their works but, under the doctrine of exhaustion, a copyright holder's exclusive distribution right over each copy of its product is 'exhausted' (i.e. lapses) once that copy is first sold in the EU with the rights holder's consent.

Thus, it has always been allowed under copyright law for a consumer to resell a legitimately purchased DVD.

The key issue submitted to the CJEU for decision in this case was whether this exhaustion mechanism could also apply where no physical medium (like a DVD) was ever sold, but the entire software was downloaded online (the case concerned Oracle software but is equally applicable to games). This question was the subject of heated debate, with one side putting forward that in download cases, no pre-existing individual copy of the game is transferred or 'sold' – in particular because games are typically provided under an End User Licence Agreement. However, others argued that any download at least involved creating a copy which could be transferred or sold and that it did not make sense to treat physical and digital distribution differently on this point.

The court has opted for the second solution, stating that the doctrine of exhaustion applies to physical and digital games alike. It felt that because the two modes of distribution were economically comparable, there was no justification for treating them differently.

The court therefore ruled that a first-time purchaser of a digital or physical game could sell the game to a second purchaser. However, the court also ruled that the first-time purchaser must then take steps to render the game "*unusable*" and that publishers could take "*technical*

measures" to ensure that this happens (though it is unclear from the judgment how any of this would apply to subsequent purchasers).

What is the legal status of this case?

Now that this judgment has been passed by the CJEU, it automatically becomes binding on the courts of all the Member States of the European Union, in the sense that all the national courts must have regard to the case as part of EU law and must ensure that their domestic laws implementing the relevant Directives are interpreted in light of this case. In the worst case scenario, domestic law which is found to be inconsistent with this case could be invalidated.

Does this decision require publishers to enable digital second hand game sales?

Not at present. In our view, the CJEU judgment was that the doctrine of exhaustion does not create a sales *right* for users of a protected work, but instead only limits the extent of the creator's copyright. In other words, EU copyright law does not entitle the creator (or its licensees) to legally prohibit second-hand sales – but it also does not create an obligation to enable or facilitate such sales either. Therefore, where technical constraints prevent second-hand sales altogether, like in the closed environments of iOS apps, there is a good argument that the CJEU decision does not change the game.

That said, given that the CJEU clearly intended for this judgment to facilitate second hand digital sales in the EU, it is unclear whether this case will be the last word on the matter. It is possible that the matter could come up again (for example via a consumer complaint, further lawsuit or regulatory action) on the basis that, in order for this case to be given full effect, publishers must be *required* to take steps to permit second hand sales (as opposed to simply deciding whether to enable second hand sales at their discretion, as the case currently seems to suggest).

Can non-copyright legal measures still be used to prevent second hand sales?

Yes. For example, In a case involving physical media, the German Federal Court of Justice decided in 2010 that while the distribution right with respect to an individual DVD may have been exhausted by the sale of the DVD,

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the publisher was still free to design the game on the DVD in a way that it required a user account with an online platform in order to work. The court also explicitly upheld clauses in the terms of use of the concerned platform which prohibited any transfer of accounts. The judges even expressly acknowledged and acquiesced to the practical effect of this situation: While the DVD as such could be freely resold, the possibility of actually using the game could not be transferred. Under the German implementation of the Computer Program Directive, the court did not find the practical lack of effect of the doctrine of exhaustion under these circumstances to cause any problem.

The position is essentially similar across the EU: non-copyright legal measures may be used to restrain second hand sales in principle, provided that an objective justification can also be provided for their use.

That said, again the uncertainty about the implementation of this case means that it is possible this matter could come under review again in the future.

If we permit second hand sales, how do we stop the first purchaser from continuing to use the game?

The CJEU was unclear about how far publishers could go to ensure that a first purchaser stops using the game once sold to a second purchaser but did expressly mention that "product keys" could be used. Therefore, even if a publisher did decide to permit digital second hand sales, there would be at least some kind of control mechanism on the process.

What does this case mean for the use of Digital Rights Management?

The case did not rule on this point. However, we consider that a reasonable argument could be made that Digital Rights Management, being intended to ensure a game is legitimately purchased in the first place, could still continue to be used. Indeed, use of some forms of DRM (such as server authentication) could have the practical effect of actually preventing (or at least making more difficult) second hand sales while at the same time serving their primary objective of reducing piracy.

How does this case apply to subscription-based, freemium or cloud-based games?

Again, the case did not rule on this point but we are of the opinion that, since such games do not involve a 'sale' or transfer of ownership as defined by the CJEU in the case,

there is no exhaustion of the distribution rights in such games. On that basis, these kinds of games would not fall under this case and effectively the status quo would remain in place.

How does this case apply to physical games?

The CJEU did not draw a distinction between physical and digital games and therefore a purchaser may in principle sell its digital or physical games to a second purchaser. However, clearly with many physical games there are less technical restrictions in place and so it seems likely that this case would in principle make it easier legally to sell second hand physical games. The CJEU was hostile to the argument historically run by many publishers, that while a purchaser can own the physical product it cannot own the game software on it – instead the CJEU held that the purchaser would own the whole of that individual physical copy of the game

Conclusion

By accepting the doctrine of exhaustion for digital copies of games, the CJEU decision does change some important parameters regarding the sale of digital games. However, at present it does not mean that publishers cannot take steps to limit or exclude second-hand sales of games any more. Things may just get a little more complicated.

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