

# Intellectual Property Theory

This panel focuses on exploring intellectual property theory in different doctrinal and cultural contexts, including theories of copyright exhaustion, theories of possession in intellectual property law, and developing theory in the intellectual property disputing process.

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## **Tethered Technologies, Cloud Strategies and the Future of the First Sale/Exhaustion Defence in Copyright Law**

**Abstract:** In *UsedSoft v. Oracle*, the Court of Justice of the EU (CJEU) held that the principle of exhaustion of the distribution right also applies to computer programs that are distributed electronically rather than sold on a physical medium. Exhaustion presupposes that a particular copy is sold, i.e. that ownership is transferred. Whereas so far the sold copy was always a material object, the CJEU extended the principle to digital copies, adopting the concept of "digital exhaustion". Although in *Capitol Records v. ReDigi* a first instance federal court in the US denied iTunes users the right to resell their legally acquired digital music files through ReDigi under the first sale doctrine, there is the possibility that courts in Europe and elsewhere will eventually extend digital exhaustion from computer software to other categories of copyright protected works.

For some time already, copyright-owning corporations, in order to avoid exhaustion, have been favouring business models where no ownership in copies is transferred, but only the right to "rent" a service as per contractual terms. The expansion of digital exhaustion beyond software may provide a legal impetus for copyright-owning companies to use technology to shift the legal basis of their business models from a one-off sale contract to a continuing obligation. The technology available today allows companies to technically inscribe these contractual terms. Tethered technologies are a core component of this, as they allow for continued observation and enforcement. (Examples of tethered appliances include the 2013 PlayStation 4, which allows Sony to monitor the access and use of purchased games, or Amazon, which used tethered technologies to delete copies of e-books in users' possession after the company became aware that it no longer had the relevant rights in the "sold" e-books). Since these technologies enable right holders to exert continued hands-on control over how copyright-protected materials are used, they allow the overriding of the exhaustion mechanism to a far greater degree than technical protection measures or digital rights management systems, which are confined to controlling access and/or copying. The paper addresses tethered appliances to look more closely at interdependencies between law and new technologies in the field of online copyright enforcement and the balance between exclusive interests of content owners and inclusive interests of the general public.