	***INFOSOC DIRECTIVE #3***	
Dr. Péter Mezei	Chapter 10 aims to introduce the content and case law related to the distribution right under the InfoSoc Directive.	***45 minutes***

Reading task
Please read the following case accessible via the attached link, and answer/discuss the questions/notes below.

Case C-263/18 - Nederlands Uitgeversverbond, Groep Algemene Uitgevers v. Tom Kabinet Internet BV and Others, Judgment of the Court (Grand Chamber) of 19 December 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=221807&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1

Please focus on the two distinct services that Tom Kabinet offered to its clients. Please also consider what form of contract it applied in its service.

Questions to the reading

1. What are the doctrinal elements of distribution and making available to the public? The most important question of the referring Dutch court was related to the applicable economic right regarding Tom Kabinet's business model. The CJEU favoured the making available to the public right over the distribution right. In *Case C-479/13*, a preliminary proceedings related to the taxation aspects of e-books, a similar logic led the CJEU to rule that the online supply of e-books represents a service rather than a sale of goods. The CJEU missed to refer to this ruling, even though it would strongly support its final conclusion. In the lack of such reference, we might note that, in *Tom Kabinet*, the CJEU paid no attention to the practical reasons why Oracle's agreement was declared to be a sale. As mentioned earlier, the CJEU ruled in *UsedSoft* that a license might be "transformed" into a sale if the right to use a computer program lasts for an indefinite period "in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor". As the CJEU failed to criticize or overrule this argument, and the online supply of e-books fulfills the doctrinal requirements of the CJEU'S *UsedSoft* standard, such "transformation" of contracts (and thus the economic rights) looks entirely valid and applicable to the supply e-books as well.

Which opinion do you favour? Can the distribution right cover the online supply of e-books? Or shall the making available to the public right apply to all online supply of files, irrespective of the contractual background of the transaction?

2. Can a contract be treated as a sale, if parties conclude a "licence" agreement?
3. The CJEU might completely misunderstood Tom Kabinet's business model. Point 69 of the Judgment is problematic, as the referring court briefed the facts of the case to the direct opposite. Imagine that – under the real facts of the case – the CJEU incorrectly viewed the members of the reading club as "public", and turn your eyes on the other element of the CJEU's argumentation: "having regard to the fact (…) that there is no technical measure on that club's platform". Imagine that Tom Kabinet (or any other platform) applies technical measures that guarantee the accession of a single copy of a work by one end-user at a given time. (We might call such a measure an effective forward-and-delete technology.) Should the CJEU's syllogism mean that digital exhaustion is acceptable in the latter situation? Or – even worse – should that mean that the CJEU believes there is no "public" in the latter situation, and so the making available to the public right "quasi exhausts"?
4. Following *Tom Kabinet*, the doctrine of exhaustion can practically lose its relevance in the online environment. Is such castration of the doctrine really in the interests of the society? Wouldn't it be wiser to force/keep competition between the rights holders and newcomers in order to guarantee the best available services for the benefit of the whole society? Indeed, the CJEU's ruling might render the CJEU's "liberal" view on e-lending meaningless as well (as the acceptance of e-lending in *VOB* was partially based on a *de facto* acceptance of digital exhaustion).

Further recommended readings

http://copyrightblog.kluweriplaw.com/2019/10/01/digital-exhaustion-may-be-needed-but-has-no-room-under-the-infosoc-directive-says-ag-szpunar-in-tom-kabinet/

http://ipkitten.blogspot.com/2019/12/breaking-cjeu-rules-that-provision-of.html

Further questions/tasks to the chapter's content

1. Who are the beneficiaries of the right of distribution under the InfoSoc Directive? Why did the directive miss to regulate related rights holders' distribution right?
2. What are the doctrinal requirements of the right of distribution?
3. Is the
    a. placement of a copy of copyrighted work in a public place;
    b. offer for sale;
    c. order of copies from a non-EU Member State via the internet;
    d. targeted advertisement for the purpose of offering for sale;
    e. storage for the purpose of sale;
    f. storage for the purpose of intra-EU transit;
    g. storage for the purpose of exportation from the EU

    against the right of distribution?
4. What are the doctrinal elements of exhaustion?
5. What is regional exhaustion?
6. Can Member States introduce a concept of exhaustion that is more limited or broader in scope compared to regional exhaustion?

7. Is the provision of an e-book to a client a service or a sale of good?

List of relevant definitions/concepts
Please think these definitions/concepts over again, as they are crucial in understanding copyright law in the EU.

national/regional/international exhaustion, droit de suite, transfer of ownership, pirated goods, offer for sale, targeted advertising, digital exhaustion

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