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ADAPTING THE DOCTRINE OF EXHAUSTION FOR THE DIGITAL AGE: A CRITICAL ANALYSIS OF THE INDIAN COPYRIGHT LAW

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ABSTRACT

A key tenet of copyright law is the theory of exhaustion, which limits the rights of copyright holders following a work's initial sale. Although this theory has been widely accepted for tangible commodities, its relevance in the digital sphere is still up for debate. There is ambiguity in the way that digital content distribution, resale, and consumer rights are treated in India because the Copyright Act, 1957, does not specifically address the exhaustion of digital copies. The difficulties of modifying the exhaustion concept in the digital age within the Indian legal system are examined critically in this paper. It looks at how changing consumer behavior, digital distribution structures, and technology breakthroughs have made conventional interpretations insufficient. Additionally, the study looks at legislative gaps and judicial trends that impede the efficient application of digital exhaustion in India.

Lastly, in order to address the realities of digital consumption and maintain a just balance between the rights of copyright holders and consumers, this paper argues for a re-evaluation of Indian copyright law.

Keywords: Digital Exhaustion, Indian Copyright Law, Doctrine of Exhaustion, Digital Distribution, Intellectual Property Rights.

INTRODUCTION

1. Concept of Doctrine of Exhaustion

The Doctrine of Exhaustion, derived from the Doctrine of First Sale, refers to the depletion of rights associated with an intellectual property asset (such as patents, trademarks, and copyrights) following a lawful transfer or legitimate sale of ownership in a tangible item that

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embodies or displays the intellectual property in question.[2] In essence, the Doctrine of Exhaustion implies that once a lawful sale has taken place, the intellectual property holder loses the right to restrict or regulate any subsequent resale of the goods that incorporate the protected intellectual property.[3]

Article 6 of the TRIPS Agreement establishes that the issue of intellectual property rights exhaustion is left to the discretion of individual nations, allowing each member country to determine, within its legal framework, whether to permit or restrict parallel imports.[4]

The Doctrine traces its origins to the 19th century when the United States Supreme Court first addressed patent rights exhaustion in Bloomer v. McQuewan (1853),here the Court propounded the common law principle stating that once a product "passes from the hands of the purchaser," it no longer remains within the "limits of the monopoly" granted by the patent.[5]

2. The Doctrine of Exhaustion and Types

As mentioned above, the problem of exhaustion of IPR is a question of national discretion and therefore the principle of exhaustion of IPR is categorized into the following:

a. **National Exhaustion**- The principle of national exhaustion of intellectual property rights holds that once a product protected by an IP right—such as a patent, trademark, or copyright—is sold within a country by the rights holder or an authorized party, the IP rights over that product are considered exhausted. Consequently, the rights holder can no longer take legal action against anyone who purchases, uses, or resells the product within the country's borders. This doctrine is adopted by approximately thirty nations.[6]

b. **International Exhaustion**- Under this principle, once a product is lawfully placed on the market anywhere in the world by the IP owner or an authorized licensee, it can be freely distributed across countries as part of a unified market. India acknowledges the

[2] Priya Adlakha, [The Viewpoint] The Doctrine of Exhaustion of IPRs in India, (Nov. 16, 2022), https://www.barandbench.com/law-firms/view-point/the-doctrine-of-exhaustion-of-iprs-in-india.
[3] Archi Jain, Parallel Imports In India: Laws, Doctrine Of Exhaustion, And Market Impact, India (June 12, 2024), https://www.mondaq.com/india/trademark/1477778/parallel-imports-in-india-laws-doctrine-of-exhaustion-and-market-impact.
[4] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, Marrakesh
[5] Bloomer v. McQuewan, 55 U.S. 539, 549 (1852)
[6] WIPO secretariat, E Standing Committee on the Law of Patents, (2022), Available at: https://www.wipo.int/edocs/mdocs/mdocs/en/scp_34/scp_34_3.pdf (last visited Oct 11, 2024).

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principle of international exhaustion under the statutory provisions of the Indian Patents Act, 1970.

Additionally, the Indian judiciary upheld the international exhaustion of trademarks in the case of Kapil Wadhwa & Ors. vs. Samsung Electronics Co. Ltd.[7]

c. **Regional Exhaustion**- Under regional exhaustion, once a product protected by an IPR is placed on the market within a specific region by the IPR owner or with their consent, the IPR owner cannot prevent the resale or further distribution of that product within the region.[8] The UK follows the principle of regional exhaustion, meaning that goods sold within the European Economic Area (EEA) cannot be restricted from being resold across Member States based on intellectual property rights. However, rights holders still have the authority to control imports from outside the EEA.[9]

APPLICATION OF THE DOCTRINE OF EXHAUSTION PRINCIPLE IN INDIA

In India, neither court cases nor amendments to the Copyright Act have addressed the issue of whether or not the resale of copyright protected material in digital formats is permitted. Indian courts have applied the rule of exhaustion only to physical objects such as books, DVDs.[10] In the following section we will try to understand India's Position with regard to resale of copyright protected material.

1. Standing Committee Observations[11]

The Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010 and the judiciary have indirectly addressed, yet have been unable to comprehensively solve, the issue of digital distribution of copyrighted works. The Copyright Act was amended in 2012, partly to align it with the WIPO Internet Treaties. The key amendment to this Act involved widening the definition of "communication to the public," with a clear reference from making works available through digital formats, not dealing only with the distribution of

[7] Kapil Wadhwa & Ors. v. Samsung Elecs. Co. Ltd., 194 (2012) DLT 23
[8] K. Saggi, Regional Exhaustion of Intellectual Property, 10 Int'l J. Econ. Theory 125 (2014). Available at DOI : https://doi.org/10.1111/ijet.12031(last visited October 14, 2024)
[9] Priya Adlakha, [The Viewpoint] The Doctrine of Exhaustion of IPRs in India, (Nov. 16, 2022), https://www.barandbench.com/law-firms/view-point/the-doctrine-of-exhaustion-of-iprs-in-india
[10] John Wiley & Sons Inc. v Prabhat Chander Kumar Jain 2010 SCC OnLine Del 2000: ILR (2010) 5 Del 510
[11] Aparajita Lath, Permanent Downloads and the Resale of Digital Content: Another Exhausting Journey?, 16 INDIAN J. L. & TECH. 1 (2020).

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physical copies. Such was the international definition under the WCT. During the debates, the musicians voiced concerns that the amendment could be misconstrued to mean digital sales, such as purchases from iTunes, were included under "communication to the public." Their case argued that digital sales should be seen as transactions similar to those that involve physical sales, thus ought not to be captured under this definition.

Addressing these fears, the Standing Committee clarified that definitely paid digital downloads would not be regarded as "communication to the public." Although the amendment made specific mention of digital copies, the Standing Committee report seemed to suggest that paid digital downloads should likewise be treated like physical copies. In this regard, the Copyright Act was not modified to place a restriction that the right of distribution and exhaustion were confined to physical copies alone. This leads to the understanding that this principle of exhaustion that prevents the copyright holder from regulating further dissemination after the first sale—would apply to digital downloads as well.

3. Single Bench Bombay High Court's view in Tips Industries v. Wynk Music[12]

In this case, the Court is in alignment with the opinion of the Standing Committee on the nature of permanent digital downloads. The case is that of a defendant who used an online platform and a mobile app for delivery of songs to customers. The latter could choose either (a) to pay a fixed fee to permanently download a song; (b) a subscription fee that would allow access to songs for a defined number of days; or (c) stream songs online. The defendant had, however, proceeded to use the songs owned by the plaintiff and did not obtain a valid license. The plaintiff thus filed a suit for infringement of copyright, alleging that the defendant was illegally distributing the sound recordings it owned. Under the Copyright Act, the owner of the copyright in a sound recording has the exclusive right to sell it. The plaintiff had to show that the defendant had sold its sound records without authorization to establish its case of infringement. The court opined that, since a one-time fee was charged, the songs permanently downloaded were "sold." This conclusion was based upon three major considerations: first, the downloaded songs were stored permanently on the customer's device; second, they could be accessed and played without needing the app; and, third, the songs could be copied or transferred onto other devices without any restrictions. The court, thus, found that since the defendant did not have a license, his actions seem to have amounted to copyright infringement. The court also referred

[12] Tips Indus. Ltd. v. Wynk Ltd., AIR 2019 Bom 1452 (India).

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to the observations of the Committee and reaffirmed that payment in exchange for permanent digital downloads does not represent a "communication to the public" but rather is distribution to public. However, both the court and the Standing Committee failed to see that the Copyright Act expressly regards the issuance of digital copies of works as "communication to the public". The amendment to this definition was meant to bring harmony between Indian copyright law and the WIPO Internet Treaties, which distinguish between digital and physical copies. By drawing the equivalence between permanent digital downloads and the BS physical copies, the court is contradicting the very purpose of the amendment. This signifies this: In India, permanent digital downloads are from a different legal perspective treated just the same as physical copies in spite of the international copyright agreements always seeing a distinction between the two.

3. Implications of Digital Resale in Indian Copyright Law.

a. Copyright Act

Currently, courts and policymakers in India have suggested the idea that digital goods, such as music or e-books supplied through permanent downloads, might be treated as a sale instead of a service. Should the interpretation be right, it would mean, once a person buys a digital good lawfully, that the right to distribute that particular copy is exhaustible by the copyright holder. This concept, or "digital exhaustion," could suggest that reselling lawfully acquired digital goods is legal in India. However, several other important questions remain without answers. Of these, a prime concern would be whether the resale of a digital copy would require making additional copies and, thus, running into violations of copyright. In the U.S. case of ReDigi[13], a company offering services for second-hand sales of digital music found itself liable because the process of resale required the making of fresh copies of the music files. By contrast, the European UsedSoft case[14] concerning software held that resale must be allowed irrespective of whether a copy has to be made because otherwise the very right to resale would be meaningless. Under Indian law, Section 52[15] of the Copyright Act enumerates examples of copying permitted under fair dealing provisions. Allowable under that provision is the making of copies of computer programs for intended use. Should digital goods, like software, be deemed to be sold, then the buyer-that is to say, the rest of the chain of title-would have the legal right to some extent to make copies to use the software. The legal position concerning other types of digital

[13] Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018)
[14] Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., 2012 E.C.R. I-0000.
[15] The Copyright Act, 1957, No. 14, Acts of Parliament, § 52 (India).

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content, such as music or e-books, is much less straightforward. To add to the complications, how would the digital resale actually work? The process of the resale of digital goods would generally start with deleting the good from one's device and then uploading it to the buyer's device, sometimes with the use of temporary storage such as on cloud platforms. Would that temporary storage count as a copyright infringement? But some might say if this storage is purely for enabling a lawful resale, it should be allowed. However, this issue has not been explicitly addressed in Indian copyright law, of course, other DRM-type mechanisms would also be needed to ensure through an objective audit mechanism whereby one digital copy is permitted to be resold lawfully, and from the moment that copy is sold, it is not in the possession of the seller. If all ran smoothly, well-designed solutions would permit consumers to resell digital goods while protecting the rights of copyright holders.

b. Challenges with exhaustion and International Trade[16]

In India, exhaustion is categorized as "international exhaustion" under the Copyright Act. Hence, when a copyright-protected product, be it a book, a DVD, or software, is sold legally once in any part of the world, the copyright holder loses all control over its further distribution in any form. Subsequent resale, import, or export of the product remains beyond its control. Courts in India have had problems interpreting the principles of exhaustion. Though some have completely ignored it, others have misapplied it. If international exhaustion were to apply to digital goods as well, any digital content legitimately purchased in one country could be resold across borders without control from the copyright owner. This might enhance consumer access to digital goods at more competitive prices. Toward the other extreme, India might align itself with the view taken by WIPO Internet Treaties, which argue that all forms of digital transfers of copyrightable materials amount to "communication to the public" and are thus never a sale. Were this perspective accepted, that could lead to a scenario where digital goods are never deemed "sold" and thus remain under the control of the copyright holder. This runs counter to the position held by the Standing Committee and the Bombay High Court, yet the text of the Copyright Act is supportive of it. The outcome of the case might also depend on how licenses for digital content are structured. In the case of Vernor v. Autodesk, a permanent download of a software program led the US court to express the view that the copyright owner retained control because the license agreement expressly stated that it was not a sale. On the other hand, in the UsedSoft case, the European court zeroed in on the intangible aspects of a license

[16] *Supra* note 11

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agreement and decreed that it really did amount to a sale. Should India face a case like this, the court will have to decide whether to consider the formal description of such license agreements or the actual operation of what they constitute.

c. Foreign Direct Investment[17]

In the context of India's foreign direct investment, however, the classification of digital goods, either as sales or as communication to the public, becomes relevant when investors are ready to invest in any medium of e-commerce operating there. Under India's foreign exchange laws, foreign investment rules differ for those providing services and for companies engaged in the sale of goods. Currently, 100 percent foreign investment is allowed in companies providing services through e-commerce, such as streaming platforms. The companies engaged in the business of buying and selling goods-whether physical or digital-are subject to stricter regulations, and they, therefore, should either be in B2B or be market space in the sense that they need to facilitate sales between independent sellers and buyers without holding any part of the product as inventory in themselves. However, they could be seen as engaging in retail trade if digital platforms offering downloadable content (music, e-books, video games) were labeled "sale of goods." Such classification, therefore, would subject them to restrictions on foreign investment, impose additional regulation on how they must operate and might limit their continued ability to do business in India. If, however, the classification were to be directed toward "communication to the public," i.e., a service rather than a sale of goods, the e-commerce platform having foreign ownership would have little respite from these restrictions. Such a distinction then becomes infinitely important to worldwide companies if they are expanding into India's digital marketplace.

SUGGESTIONS AND CONCLUSION

In Conclusion , India should consider adopting the doctrine of exhaustion for digital goods, only within well-defined legal safeguards to prevent copyright infringement, because unlike physical goods, digital content can be duplicated again and again without degradation, this raises concerns about unrestricted resale and potential market disruptions.but these concerns should not result in absolute denial of the application of exhaustion to digital goods as that can also limit consumer rights and put excessive control in the hands of copyright holders.

[17] *Id.*

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Meeting at the mid-way, ensuring that digital resale is permitted under specific conditions, is the most effective solution to seamlessly adapt digital exhaustion in India. To this end, policymakers must first amend the Copyright Act to clarify the legal status of digital downloads—whether they constitute a sale or a service. If treated as a sale, digital exhaustion should apply, but with technological restrictions to prevent unauthorized duplication. Next, Digital Rights Management (DRM) systems and blockchain-based tracking should be implemented to ensure that once a digital file is resold, the original copy is deleted, preventing multiple reproductions. Also, temporary storage mechanisms for resale, such as cloud-based transfers, should not be deemed as copyright infringement when they exist solely to facilitate legal resale.

Indian courts must try to adopt an approach focussed on licensing, ensuring that resale rights depend on the terms of the original transaction. If a digital purchase grants full ownership (not a license to use), the exhaustion principle should apply, allowing resale under regulated conditions.

Lessons from foreign jurisdictions can provide valuable insights into how India could shape its digital exhaustion policy. For instance in the U.S. ReDigi case is a classic example of the risks of digital resale leading to copyright infringement, as reselling digital goods often involves making unauthorized copies. To avoid such problems, the Indian legal framework needs to ensure that resale platforms use technology to prevents duplication.

On the otherhand, in EU UsedSoft case , it has been said that digital exhaustion can be implemented while still respecting copyright laws, in that case the court ruled that software resale should be permitted, even if a copy must be made, reinforcing that exhaustion applies to digital goods when they are "sold" rather than licensed.. Simply put, India should carefully evaluate whether digital transactions genuinely transfer ownership or are simply licensing agreements disguised as sales.