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EU-China Roundtable on Copyright Protection in the Digital Environment
中欧数字环境下版权保护研讨会

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European Union
Intellectual Property Office
欧盟知识产权局

National Copyright
Administration of China
中国国家版权局

APPLICATION OF THE RIGHT OF MAKING AVAILABLE TO THE PUBLIC, WITH SPECIAL ATTENTION TO THE QUESTION OF "ONLINE EXHAUSTION"
向公众提供权的应用以及网络环境下权利穷竭问题

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INTRODUCTION – DIGITAL EXHAUSTION?

I. 引言 – 数字作品的权利穷竭?

The WIPO Treaties on the exhaustion of right
世界知识产权组织条约下的权利穷竭

Article 6 of the WIPO Copyright Treaty (WCT) on the Right of Distribution
《世界知识产权组织版权条约》第六条——发行权

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
(1)文学和艺术作品的作者应享有**授权**通过销售或其他所有权转让形式**向公众提供其作品原件或复制品的专有权**。

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.
(2) 对于在**作品的原件或复制品**经作者授权被**首次销售或其他所有权转让之后适用本条第(1)款中权利的用尽所依据的条件**(如有此种条件)，**本条约的任何内容均不得影响缔约各方确定该条件的自由**。

Agreed statement concerning Articles 6 and 7: as used in these Articles, the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.
根据第六和第七条中一致的表述，所述条款中发行权和出租权适用的"复制品"和"原件与复制品"**专指**可以流通的**有形物品**。

Mutatis mutandis the same provisions in Article of the WIPO Performances and Phonograms Treaty (WPPT) and in Article of the Beijing Audiovisual Performances Treaty (BTAP)
已作必要修正《WIPO 表演和录音制品条约》(WPPT) 和《视听表演北京条约》(BTAP) 中的相同规定和条款

Thesis: no „online exhaustion”
命题：网络环境下的权利穷竭不存在

- The Treaties **only** provide for the exhaustion of **the right of distribution.**
  条约**只**规定了**发行权**的权利穷竭
- The right of distribution **only applies to tangible copies**.
  发行权**仅适用于有形复制品**
- **In the case of online use** of works and subject matter of related rights (hereinafter together: works), **there are no tangible (but only digital) copies**.
  就相关权利的作品和题材（“作品”）之**线上使用而言，这些作品不存在有形复制品（仅有数字版本的复制品）**

Therefore, there is no „online exhaustion,”
unless in this form:

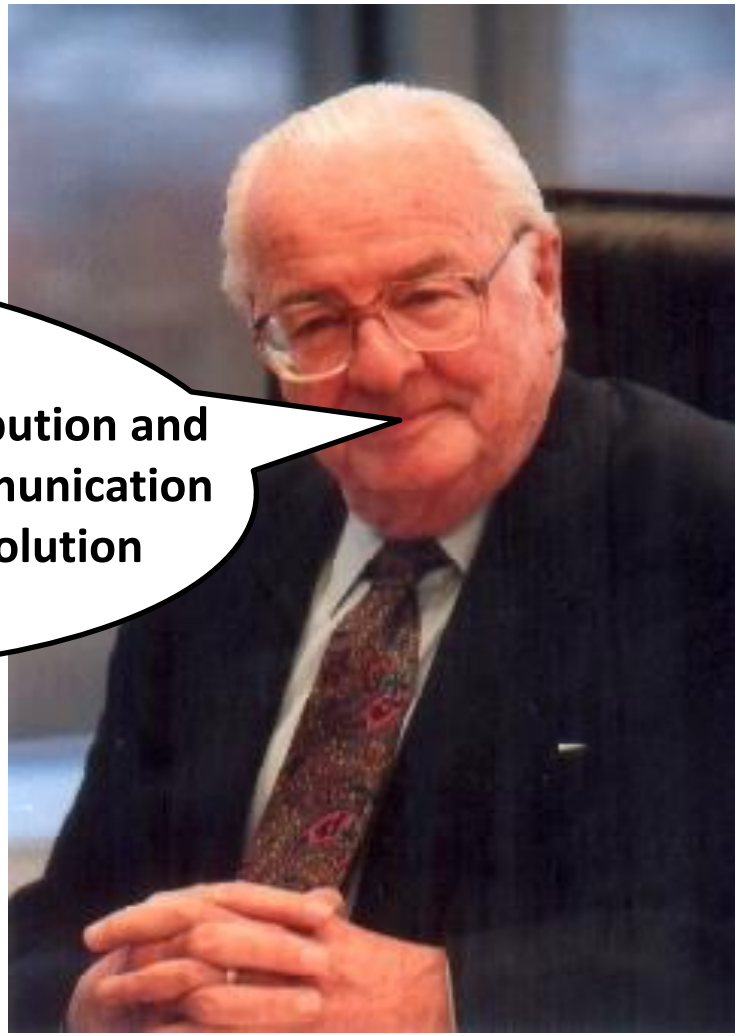
因此，目前没有“网络环境下的权利穷竭”，
只有以下形式的精力穷竭：

II. THE „UMBRELLA SOLUTION" AND ITS DIFFERENT WAYS OF APPLICATION IN THE WCT AND THE WPPT (AND THE BTAP)

"伞式解决方案"和该方案按照《世界知识产权组织版权条约》(WCT)《表演和录音制品条约》(WPPT)《视听表演北京条约》(BTAP) 的不同适用情况

Agreement and disagreement at the preparatory meetings of what became WCT and WPPT
《世界知识产权组织版权条约》《表演和录音制品条约》筹备期间各方的共识和分歧

- ***Agreement***: **at the moment of inclusion** of a work or object of related rights **into the Internet**, owners of rights must have an **exclusive right of authorization or prohibition of such an act**.
- ***共识：*** 相关权利的作品或物品进入互联网一刻起，权利所有者必须拥有授权或禁止将相关权利的作品或物品放入互联网这一行为的专有权
- *Disagreement*: (due to the **differing statutory rules, established practices and acquired rights**) **what kind of right or rights** should be recognized or newly granted.
- ***分歧:***（由于法规、既定做法、已获得权利不同）应当认可或批准**何种权利?**
  - ***European Communities:*** (in addition to the right of reproduction) the **right of communication to the public**.
  - ***欧洲***: （在复制权的基础上）向公众传播的权利
  - ***United States:*** (in addition to the right of reproduction) the **right of distribution (in combination with the „right o**f public performance" = in the context meaning **communication to the public**).
  - ***美国***: （在复制权的基础上）结合发行权和公开表演权 = 在该情形下即指 向公众传播的权利
- ***Objectively*: hybrid acts**, including both acts which may be characterized as distribution (**transmissions for downloading**) and acts in the case of which the communication-to-the-public element dominates (**streaming**).
- ***从客观角度对待***: **复合行为，** 包括可以被视作发行的行为（**发送以供下载**）以及公开表演居于主要地位的行为 （**直播**）



Mihály, in this way,
you will not get your Treaties. The
Americans are for the right of distribution and
the Europeans for the right of communication
to the public. You should find a solution
to eliminate the deadlock!

Mihály，这样的话，
条约是很难达成的。美国人主张发行权，
而欧洲人主张向公众传播权，
各方难以达成一致。
要想办法解决这个僵局！

Arpad Bogsch

„Umbrella solution": idea and sources
"伞式解决方案"：设想和来源

Idea – to achieve this:
兼顾二者的设想：
1)Exclusive right of authorization
专有权授权
2) Neutral description of the acts to cover both downloading and streaming
同时描述下载和直播行为的中性词
3) Freedom of legal characterization
法律定性的自由

设想和解决方案的来源：
1)Article 3 of the Phonograms Convention
《录音制品公约》第三条
2) Articles 7(2) and (3), 10(1) and 10*bis*(2) of the Berne Convention
《伯尔尼公约》第七条第二、第三款，第十条之二第一、第二款
3) The principle of **relative freedom of characterization of rights and acts**
权利和行为特征化的相对自由原则

„Umbrella solution”

“伞式解决方案”

Making available to the public of works / performances / phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them

通过有线或无线方式，向公众提供作品/表演/录音制品，**使公众中的成员在其个人选定的地点和时间可获得这些**作品/表演/录音制品。

Umbrella Solution

Mihály,
让斯德哥尔摩集团
看看这份解决方案吧!

The Stockholm Group's proposal, negotiations, and the adopted provisions
斯德哥尔摩集团经过提议、磋商，采用了若干规定

- The **Stockholm Group** was the forum of the **leading industrialized countries set up for the preparation of what became** the WCT and the WPPT, in which **the European Communities and the United States played the most important roles**.

  斯德哥尔摩集团是**领先工业国家设立的**论坛性组织，是《世界知识产权组织版权条约》和《表演和录音制品条约》的**前身。欧洲共同体和美国在斯德哥尔摩集团发挥主要作用。**
- In the Group it was agreed upon that **the European Communities** would **present the joint proposals. The proposals, in the case of the draft treaty which became the WPPT, corresponded fully to the „umbrella solution", while, in the case of the draft treaty which became the WCT**, the right of making available to the public **was included as a „sub-right" of a broad right of communication to the public (with an agreement that it would be clarified** – as requested by the US – **that the right may be implemented through the application of some other right(s)).**

  集团内部，各方达成一致，由欧共体提出联合方案。**这些方案中，后来成为《表演和录音制品条约》的**条约草案**充分对应"伞式解决方案"**；而**后来成为《世界知识产权组织版权条约》的条约草案中**，作品向公众公开成为这广泛传播权的附属权利（应美国要求，**各方同意要进一步明确，该权利的行使可通过行使其他若干权利实现**）
- At the Diplomatic Conference, **such provisions were adopted**.
- 在外交大会上，**采纳了这些条款。**

WCT: half-opened umbrella

WCT: 半伞式方案

Article 8: Without prejudice to the provisions of Articles 11(1)(ii), 11bis (1)(i) and (ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing **any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.**

第八条 向公众传播的权利在不损害《伯尔尼公约》第11条第(1)款第(ii)目、第11条之二第(1)款第(i)和(ii)目、第11条之三第(1)款第(ii)目、第14条第(1)款第(ii)目和第14条之二第(1)款的规定的情况下，文学和艺术作品的作者应享有专有权，以授权将其作品以有线或无线方式向公众传播，包括将其作品向公众提供，使公众中的成员在其个人选定的地点和时间可获得这些作品。

Agreed statement concerning Articles 6 and 7: as used in these Articles, **the expressions "copies" and "original and copies" being subject to the right of distribution** and the right of rental under the said Articles, **refer exclusively to fixed copies that can be put into circulation as tangible objects.** (Emphasis added.)

根据第六和第七条对应的表述，所述条款中发行权和出租权**适用的"复制品"和"原件与复制品"专指可以流通的有形物品 。**（原文无下划线）

WPPT: fully opened umbrella
WPPT: 全伞式方案

•**Article 10 and 16:** [Performers][Producers of phonograms] shall enjoy the **exclusive right of authorizing the making available to the public** of their [performances fixed in phonograms][phonograms], **by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.**

第10条和第16条：[表演者][录音制品的制作者]应享有**专有权，以**授权将其[录音制品录制的表演][录音制品]以有线或无线方式**向公众提供**从而**使公众中的成员在其个人选定的地点和时间可获得这些作品**。

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: As used in these Articles, **the expressions "copies," and "original and copies" being subject to the right of distribution** and the right of rental under the said Articles, **refer exclusively to fixed copies that can be put into circulation as tangible objects.**

根据第二条(e)项、第8、9、12、13条中一致的表述，所述条款中**发行权**和出租权**适用的"复制品"和"原件与复制品"专指可以作为有形物品流通的固定复制品。**

III. THE INFORMATION SOCIETY DIRECTIVE ON THE RIGHT OF MAKING AVAILABLE TO THE PUBLIC, THE RIGHT OF DISTRIBUTION, AND THE EXHAUSTION OF RIGHTS

关于向公众提供权、发行权、权利穷竭的信息社会指令

Implementation in the Information Society Directive (1)
《信息社会指令》的实施 (1)

Article 3 第三条

1.Member States shall provide authors with the **exclusive right** to authorise or prohibit **any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them**.

成员国须向作者提供专有权，以授权或禁止**将其作品以有线或无线方式向公众传播，包括将其作品向公众提供，**使公众在其个人选择的地点和时间获取这些作品。

2. Member States shall provide for the **exclusive right** to authorise or prohibit **the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them**: (a) for performers, **of fixations of** their **performances**; (b) for phonogram producers, **of** their **phonograms**; (c) for the producers of the **first fixations of films**, of the original and copies **of** their **films**; (d) for broadcasting organisations, of fixations **of** their **broadcasts**, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

成员国须提供**专有权**，以使(a)表演者**对其录制的表演**；(b)录音制品的制作者**对其录音制品**；(c)**电影首批录制品**的制作者**对其电影**原件和复制品；(d)广播组织**对其播音录制品**，不论这些播音的传播方式是有线或天空、包括电缆和卫星授权或禁止**以无线或有线方式向公众提供，使公众在其个人选择的地点和时间获取这些作品。**

Implementation in the Information Society Directive (2)
《信息社会指令》的实施 (2)

Article 3(2) 第三条第二款

The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

本条规定之**向公众传播或向公众提供的行为不得穷竭第一和第二段引述的权利**

Article 4 第四条

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the **exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise**.

成员国须向作者提供**专有权**，以授权或禁止将其作品原件或复制品**通过销售或其它任何方式向公众发行。**

2. The distribution right **shall not be exhausted within the Community** in respect of the original or copies of the work, **except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent**.

除非权利人或经其同意，权利人在共同体范围内首次出售或转移作品，作品原件和复制品的发行权**在共同体范围内不应被穷竭。**

IV-A. CASE LAW ON THE QUESTION OF „ONLINE EXHAUSTION" – *UsedSoFt*

关于网络空间的权利穷竭问题的案例法 – 以 *UsedSoFt* 公司为例

CJEU's judgment in *UsedSoft*
欧盟法院就 *UsedSoft* 一案的判决

In ***UsedSoft v. Oracle*** (CJEU case C-128/11) the subject matter of the dispute was Oracle's programs covered by an **end-user license agreement (EULA**). The EULA contained a term forbidding the licensee to transfer the computer program to a third party. ***UsedSoft*****,** a company based in Germany, ***allowed*** its costumers to **"resell" through its online system**, **programs covered by the licenses.**

在 *UsedSoft 诉 Oracle* （欧盟法院 C-128/11 号案件）一案中，纠纷围绕**终端用户协议（EULA）**所适用 Oracle （甲骨文公司）的计算机程序。终端用户协议中，某条款禁止被授权人将该计算机程序传输予第三方。总部在德国的 ***UsedSoft* 公司**允许顾客**通过在线系统将许可适用的计算机程序"转售"。**

The **CJEU held that the exhaustion of the right of distribution is also applicable for copies of computer programs made through online transmissions** under an EULA, **which should be regarded, according to the Court, „sale" (= distribution of copies).**

欧盟法院裁定，发行权的穷竭同样适用于根据终端用户协议**线上传输的计算机程序的拷贝**。法庭认为，应视其为"**销售**"=（复制品的发行）

CJEU: in the relationship of the two Directives, the principle of *lex specialis derogat legi generali* applies
欧盟法院：就两条并行指令而言，“特别法优于一般法”原则适用

- The CJEU quoted **Article 1(2)(b) of the Information Society Directive** according to which „**this Directive shall leave intact and shall in no way affect existing Community provisions relating to: (a) the legal protection of computer programs**;” It deduced from this that, **if the Computer Programs Directive contain provisions that contradict the Information Society Directive, the provisions contradicting the Information Society Directive appl**y.
- 欧盟法院引述**《信息社会指令》第一条第二款(b)项**，**“本指令须不触动且不以任何方式影响涉及现行欧共体有关a)计算机程序法律保护的法规。”** 据此推定，如果《计算机程序指令》包含和《信息社会指令》相悖的规定，和《信息社会指令》相悖的规定优先适用。

- **But Recital (15)** of **the latter Directive makes it clear that the provisions serve the implementation of the WCT and the WPPT**. **It would have been illogical and meaningless** to adopt a Directive to implement the Treaties but **to leave intact certain provisions in previously adopted directives which contradict the Directive and the Treaties. And the EU legislators did not do so.**
- **但**《信息社会指令》的第(15)条**事实叙述部分明确指出，指令的条款符合**《世界知识产权组织版权条约》和《表演和录音制品条约》。为实施两个条约而建立《信息社会指令》，但又**不触动已施行指令中与《信息社会指令》和两个条约**相悖的**特定条款，这不符合逻辑且没有意义。这不是**欧盟立法者的本意。

But: no provision in the Computer Programs Directive that may contradict the Information Society Directive

但是：《计算机程序指令》条款不存在与《信息社会指令》相悖的情况

- However, **there is no provision in the Computer Programs Directive that would contradict the Information Society Directive**. In particular, **there is no provision that might suggest that,** in the case of computer programs, **online transmission (making available)** of computer programs – irrespective of whether or not it is characterized as sale (= distribution) – **would result in exhaustion of the rights of reproduction and making available to the public.**
- 然而，**《计算机程序指令》条款不存在与《信息社会指令》相悖的情况。**具体而言，**没有规定表示**针对计算机程序的**线上传输（提供）**，不论其被定性为销售（即发行）与否，**会导致拷贝和向公众提供权利穷竭的情况。**

- **The CJEU went back to the past, read into the Computer Programs Directive certain rules that are not there, and then it referred to those „rules"as *lex specialis*.**
- **欧盟法院回顾研究过去情况，发现《计算机程序指令》中没有某些规则，法庭把这些规则确定为优先特别法规则。**

CJEU's arguments about alleged *lex specialis* provisions: „sale"
就*优先适用的特别法规*，欧盟法院针对"销售"的论证

- The CJEU has pointed out that **Article 4(2) of the Software Directive refers, without further specification, to the „sale of a copy"** of a program, **and „thus makes no distinction according to the tangible or intangible form of the copy**." This is **to be considered *lex specialis* in contrast with the *lex generalis* provisions of the Information Society Directive**, according to the Court, justifying the exhaustion of acts of making copies through online transmissions.
- 欧盟法院提述，**《软件指令》的第四条第二款指代的是计算机程序"拷贝复制品销售"，对此没有深入具体描述，因此没有区分拷贝复制品的有形或无形。**与**《信息社会指令》一般法条款不同，该规定为优先特别法**，法院如是说，以解释复制品在线上传播的穷竭。

- However, **Article 4(2) of the Information Society Directive also reads as follows: „sale of copies" of the work** (where „work" means any work **including any computer program**). **There is no difference.** It is true that there is **no obstacle to characterize** making copies through transmission **as distribution through sale**. This, however, **does not change the fact that, by such an acts** – which is in fact and act of making available to the public – **no exhaustion takes place**.
- 然而，**《信息社会指令》第四条第二款中，原文提到：作品"复制品的销售"**（作品指包含**任何计算机程序**的作品）。其中**无差异**。确实，把**以传输方式制作复制品**定性为**通过销售发行**，这一点上是**没有障碍**的。然而，**该行为**——实际上属于向公众提供——**没有穷竭权利**，**这一点没有改变。**

CJEU's arguments about alleged *lex specialis* provisions: „in any form" (1)
就*优先适用的特别法规*，欧盟法院针对"以任何形式"的论证（1）

The CJEU refered to **Article 1(2) of the Computer Programs Directive** which states that „**[p]rotection in accordance with this Directive shall apply to the expression in any form of a computer program." (In fact: reference to both source code and object code.)**

欧盟法院提述，**《计算机程序指令》第一条第二款的原文**，"[...]根据本指令的**保护须适用于**计算机程序以任何形式的表达"。（**实际上指：计算机程序的源代码和结果代码**）

The Court then stated: „**Those provisions… make abundantly clear the intention of the European Union legislature to assimilate**, for the purposes of the protection laid down by Directive 2009/24, **tangible and intangible copies of computer programs**."

法庭陈述，"这些法规充分阐明，欧盟立法机构意图**将有形和无形的计算机程序拷贝纳入，**以实施2009/24号指令规定的保护"。

CJEU's arguments about alleged *lex specialis* provisions: „in any form" (2)
就*优先适用的特别法规*，欧盟法院针对"以任何形式"的论证（2）

Two comments should be made **concerning this argument**:

针对该论证，要作两点评论：

- First, **digital intangible copies included in electronic memories are covered by the concepts of „copy" and „reproduction" under the Information Society Directive – and the WCT – too. It does not change the fact that the right of „distribution" and the principle of exhaustion only apply to tangible copies**.
- **首先，根据《信息社会指令》**《世界知识产权组织版权条约》，**"复制品"及"制作复制品"的概念也涵盖储存于电子存储体的数码无形拷贝。发行权利和权利穷竭原则只适用于有形复制品，这一点没有改变。**

- Second**, according to the Court**, the provision under which which **computer programs are protected by copyright „in any form" is a *lex specialis***. In fact, **it is obviously *lex generalis* in view of Article 2(1) of the Berne Convention,** under which all **works are proteced** „**whatever may be the mode or form.**"
- **第二，根据法庭陈述，**规定任何形式的**计算机程序受版权保护的条款，是优于一般法适用的特别法。**但实际上，**这明显是一般法，参照《伯尔尼公约》第二条第一款，其中规定，所有作品受到保护，"不论其模式或形式如何"。**

-

CJEU: „that copy" is „that copy" even if it is a *new copy* copied from „that copy"
欧盟法院：即便由“拷贝乙”拷贝而来，“拷贝甲”仍属同一拷贝

- **Article 4(2) of the Computer Programs Directive:**

  《计算机程序指令》第四条第二款规定：

  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.

  权利人或经其同意在共同体范围内首次出售程序拷贝件，即穷竭了该拷贝在共同体范围内的发行权，但控制该程序或其拷贝进一步租赁权利除外。

- **The CJEU,** by supporting its *lex specialis* theory, **has stated that (i) the copy which are uploded** to *the UsedSoft* system**; (ii) the copy stored there; and (iii) the copy downloded** by the new owner **are the same copy = that copy**
- **欧盟法院**支持其特别法优先适用的理论，指出：(i) 上传到 UsedSoft 系统的拷贝；(ii) 存储在该系统中的拷贝；(iii) 新用户下载的拷贝，属同一拷贝 = 该拷贝

There are specific norms in the Computer Programs Directive, but not these
《计算机程序指令》中有具体规定，但不是这些规定

There are specific norms in the Computer Program Directive that form *lex specialis*, **such as the provisions on decompilation** of programs. In contrast, **there is no *lex specialis* element that would justify the exhaustion of the right of reproduction and the right of making available in case of making copies through online transmission**, even if what actually takes place in this respect is characterized as „distribution."

《计算机程序指令》中有关于优先适用之特别法的具体规定，如关于程序反编译的规定。与此相反，**针对通过在线传输制作复制件的情况，**即使实际发生的情况被定性为"发行"，**特别法也没有内容来定型这是复制权利和提供权利的穷竭。**

UsedSoft: conclusions (1)
UsedSoft：结论(1)

- It also should be taken into account that **a program is a tool**. **If** if it were **truly deleted, the original owner simply could not use it** . **There are , however, serious doubts about the reliability of the system.** The original owner may simply make a back-up copy before uploading the program to UsedSoft
- 此外，还应考虑到**程序是一种工具**。如果程序**确实被删除**，**原所有人根本无法使用该程序。然而，会严重质疑该系统可靠性**。 在将程序上传到 UsedSoft 之前，原所有人可以简单地制作一个备份副本。

- Oracle pointed out: **it cannot be safely controlled that, when a new copy is made in the *UsedSoft* system and then one more by the new „buyer,"** no other copy may be available on an external device. The **CJEU has made the remark that „infringements do happen also in other cases**."
- 甲骨文公司指出：**如果在 UsedSoft 系统中制作一个新拷贝，接着新"买家"又制作了另一个新拷贝，**在外部设备上可能没有其他拷贝，**对此是无法安全可控的**。欧盟法院指出，**"侵权行为在其它情况下也会发生"** 。

- However, **there is a big difference for the hen between two cases: (i) whether the fox should come to the henhouse to try to catch the hen, (ii) or the hen is placed in the fox's cave with the inscription „you should swear you do not eat it!"**
- 但是，我们以狐狸抓母鸡打比方，以下两种情况有很大区别：(i)到底是 狐狸到鸡舍抓母鸡；(ii) 还是母鸡已经放在了狐狸窟里，窟里刻着 "你发誓不吃它！" 。

UsedSoft: conclusions (2)
UsedSoft：结论(2)

- **One may shrug off** this **by saying that hopefully the technology and/or the transformation of the contractual system may offer solutions** for the owners of rights to prevent conflicts with the exploitation of their rights. However, this **does not solve the immediate problems**.
- **有人可能会耸肩说，希望技术和/或合同制度的演变能为权利人提供解决办法**，以防止利用其权利时发生冲突。然而，**这并不能解决眼前的问题。**

- Commentators expressed the **hope that the introduction of online exhaustion would only concern computer programs** – and not mainstream categories of works.
- 评论者表示，**希望引入网络空间的权利穷竭只涉及计算机程序，而不涉及主流作品类别。**

- **Some other commentators**, however, **celebrated** *UsedSoft* **as a first step towards** the recognition of **online exhaustion** of digital copies.
- **但也有一些评论者认为，UsedSoft 案是朝着**承认**网络空间内数字拷贝权利穷竭迈出的第一步。**

IV-B. CASE LAW ON THE QUESTION OF „ONLINE EXHAUSTION" – *Redigi*

关于网络空间的权利穷竭问题的案例法 – 以 *Redigi* 为例

Judge Sullivan in *ReDigi* (1)
沙利文法官在 *ReDigi* 一案中的观点(1)

•The case was about the **ReDigi system** to which the **users were able to upload digital copies of sound recordings and sell them online to other users** of the system **on the understanding that allegedly the copies were simultaneously deleted.**

该案涉及 **ReDigi 系统**，**用户可以将录音制品的数字拷贝上传到该系统，并在线出售给系统的其他用户**，并且用户同意原先的拷贝会被同时删除。

•Judge Sullivan at the District Court of Southern New York, in its order adopted in the **Capitol Record, LLC v. ReDigi Inc. case** (No. 12-0095, 2012. US), **applied the law in its existing *de lege lata* form and did not volunteer to introduce online exhaustion – stating that it is a *lege ferenda* issue to be dealt by the Congress**.

纽约南部地区法院的沙利文法官**在Capitol Record有限责任公司诉ReDigi公司案（美国2012年第 12-0095 号案件）中通过的命令中适用了实定法的形式**，**没有主动引入在线穷竭**。沙利文法官指出这是一个拟议法问题，应由国会处理。

Judge Sullivan in *ReDigi* (2)
沙利文法官在 *ReDigi* 一案中的观点(2)

The Court reasoned that **the first sale doctrine applies only to the owner of a „particular copy" (= „that copy") and is limited to the sale or other transfer of material items** in the stream of commerce. Because **the communication of a digital file** (as opposed to a material object, such as a CD, in which the file is fixed) **necessarily results in the making of a new material instantiation** (in the recipient's hard drive), **the recipient does not obtaine possession of „that copy". Making new copies of works fall outside the scope of the first sale doctrine**.

法院裁定，**首次销售原则仅适用于"特定副本"（="该副本"）的所有人，并且仅限于**商业中**实际物品的销售或其它转让**。由于数字文件（与实际物品相对，如 CD，文件被固定在 CD 中）的传播**必然导致产生一个新实物化的实体**（在接收者的硬盘中），**因此接收者并没有获得"该副本"的所有权。制作作品新副本不属于首次销售原则的范畴。**

Judge Sullivan in *ReDigi* (3)
沙利文法官在 *ReDigi* 一案中的观点(3)

Judge Sullivan quoted a report of the U.S. Copyright Office:

沙利文法官**引用了美国版权局的一份报告：**

- **[P]hysical copies of works degrade with time and use, making used copies less desirable** than new ones. **Digital information does not degrade,** and can be reproduced perfectly on a recipient's computer. **The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy** of the same work.

•[...]作品的物理复制品会随着时间和使用而退化，使旧复制品不如新复制品**受欢迎。数字信息不会退化**，可以在接收者的计算机上完美复制。**"用过的"复制品与同一作品的新复制品一样受到青睐（事实上，两者毫无区别）。**

- **Time, space, effort and cost no longer act as barriers to the movement of copies**, since digital copies can be transmitted nearly instantaneously with minimal effort and negligible cost.

  时间、空间、精力、成本不对拷贝流通构成障碍，因为数字拷贝几乎可以即时传输，只需极少的精力和可忽略不计的成本。

- **The need to transport physical copies** of works, which acts **as a natural brake** on the effect of resales on the copyright owner's market, **no longer exists in the realm of digital transmissions**.

  传送作品的**实体复制品天然影响到**版权所有人市场的转售情况。 **但在数字传输领域，不存在这种问题。**

- **"Used" copies would compete** for market share **with new copies** .
- **"已使用的"复制品将与新复制品争夺**市场份额……。

IV-C. CASE LAW ON THE QUESTION OF „ONLINE EXHAUSTION” – *Tom Cabinet*

关于网络空间的权利穷竭问题的案例法 – 以 *Tom Cabinet* 为例

Tom Kabinet: no online exhaustion (1)
Tom Kabinet 主张：网络空间的权利穷竭不存在 (1)

The ruling of the CJEU in **Nederlands Uitgeversverbon v Tom Kabinet (case** C-263/18):

欧盟法院在 **Nederlands Uitgeversverbon v Tom Kabinet** (欧盟法院 C-263/18 号案件) 案中的裁决：

The supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' and, more specifically, by that of 'making available to the public of [authors'] works in such a way that members of the public may access them from a place and at a time individually chosen by them', within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

根据欧洲议会和欧洲理事会 2001 年 5 月 22 日《关于协调信息社会中版权及相关权利的某些方面第 2001/29/EC 号指令》第三条第一款的规定，**通过下载向公众提供电子书**供永久使用**属于"向公众传播"的概念**，更具体而言，属于"**向公众提供**[作者]**作品**，使公众可以在个人选择的时间和地点获取这些作品"的概念。

That is: no online exhaustion

即：**网络空间的权利穷竭不存在**

Tom Kabinet: no online exhaustion (2)
Tom Kabinet 主张：网络空间的权利穷竭不存在 (2)

The CJEU's **findings to underline the ruling**:

•欧盟法院的**裁决结果强调**:

•„As is apparent from Article 3(1) of [the Information Society] Directive 2001/29, authors have the **exclusive right to authorise or prohibit** […] the **making available to the public** of their works in such a way that members of the public may access them from a place and at a time individually chosen by them." (Para 35.)

• "从《[信息社会]第 2001/29 号指令》第 三条第一款中可以明显看出，**作者拥有授权或禁止[……]向公众提供**其作品的**专有权利**，以便公众的成员可以在个人选择的时间和地点获取这些作品"（第 35 段）。

•**Article 6(1) of the WCT** defines the right of distribution as the exclusive right of authors to authorise the making available to the public of the original and copies[…] It is apparent from the wording of the Agreed Statements concerning Articles 6 and 7 of the WCT that **'the expressions "copies" and "original and copies", being subject to the right of distribution[…] refer exclusively to […] tangible objects**', and therefore that Article 6(1) cannot cover the distribution of intangible works such as e-books. (Para. 40)

《世界知识产权组织版权条约》第六条第一款将发行权定义为作者授权向公众提供原件和复制品的专有权利[……]从关于 WCT 第六条和第七条的商定声明的措辞中可以明显看出，**"受发行权约束的'复制品'和'原件及复制品'[……]专指[……]有形物品"**，因此第 6 条第(1)款不能涵盖电子书籍等无形作品的发行。(第 40 段)

Tom Kabinet: no online exhaustion (3)
Tom Kabinet 主张：网络空间的权利穷竭不存在 (3)

The CJEU's **findings to underline the ruling**:
欧盟法院的**裁决结果强调**：

•**Article 4(1) of the [Information Society] Directive**,[…] provides that authors have, in respect of the original of their works or of copies thereof, **the exclusive right to authorise** or prohibit any form of **distribution to the public by sale** or otherwise, that right being, under Article 4(2) of that directive**, exhausted where the first sale** or other transfer of ownership **in the European Union** of the original or **of a copy of the work is made by the rightholder** or with his or her consent. (Para. 35.)

[信息社会]指令第四条第一款规定，[……]作者对其作品原件或复制品**享有授权**或禁止以出售或其它方式**向公众发行的专有权，根据该指令第四条第二款，如果作品原件或复制品的所有权在欧洲联盟内首次出售或其它转让经权利人作出或经其同意，则该权利已穷竭。(第 35 段）。**

•**Recitals 28 and 29 of the Directive** […] relating to the distribution right, state[…] respectively, that that right includes the exclusive right to control 'distribution of the work incorporated in a tangible article' and that **the question of exhaustion of the right does not arise in the case of[…] online services.**
关于发行权的指令[……]**第 28 和 29 条事实称述**分别指出[……]，该权利包括控制"有形物品中作品发行"的专有权，而且在[……]**在线服务的情况下不存在权利穷竭的问题**。

THE CJEU'S „NEW PUBLIC" THEORY WITH IMPLIED EXHAUSTION OF RIGHT AND ATTEPTS AT CORRECTING IT

欧盟法院“新公众”理论暗示权利穷竭及纠正尝试

Berne Convention: no criterion of „new public”
《伯尔尼公约》：没有“新公众”标准

- **Article 11*bis* (1)(ii) of the Berne Convention**: [a]uthors of literary and artistic works shall enjoy the **exclusive right of authorizing**:… **any communication to the public by wire or by rebroadcasting** of the broadcast of the work, **when this communication is made by an organization other than the original one**”; (Emphasis added)

  《伯尔尼公约》第 11 条第一款(ii)： [...]文学和艺术作品的作者享有**专有授权权利**：**……**作品的广播后**通过有线或转播向公众进行的任何传播，而该种传播由原机构以外的组织进行**；（原文**无下划线**）

- The right covers **any new act of commmunication or retransmission to the public ,** and **not only communication or retransmission to a new public**.

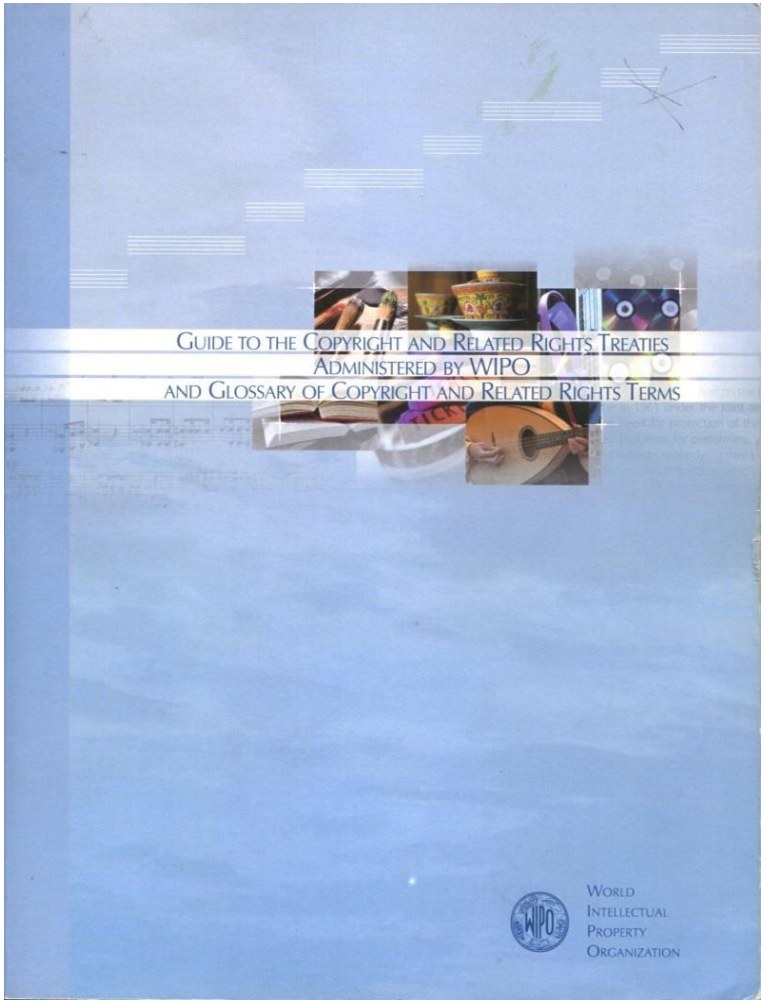
  该权利范畴包括**任何向公众传播或转播的新行为**，而**不仅仅是向新公众传播或转播。**

„New public" theory – the source
"新公众"理论 – 源起

- **In the SGAE judgement** (Case C-306/05), **the CJEU did not interprete of Article 11*bis*(1) of the Berne Convention** on the basis of its text and negotiation history (the so-called „preparatory work").
- **在 SGAE 案的判决**（C-306/05 号案件）中，**欧盟法院没有根据《伯尔尼公约》**的文本和谈判历史（所谓的 "筹备工作"）**对第 11 条第一款进行解释。**

- **It based its interpretation exclusively on an old out-of-date WIPO Guide published in 1978 as an introductory paper for developing countries – in the Preface of which it was stressed that it had been written in a simple style and was** not intended to be a thorough interpretation **of the Convention.**
- **其解释完全基于 1978 年出版的、已过时的《世界知识产权组织指南》，这是一份面向发展中国家的介绍性文件——该指南序言中强调，该出版物写作风格简单，**并不作为对**《公约》**的全面解释**。**

- **Apparently, the judges had not been informed by** the secretariat that , **if they considered a WIPO** publication a „**reliable source**" (i) **they should have made use of the resolutions adopted by the competent bodies of the Berne Union after 1978**, and (ii) **if they wanted to use the WIPO Guide to the Berne Convention, they should have used the new Guide published in 2003**, that is 25 years later.
- **显然，秘书处先前没有告诉法官，如果认为知识产权组织**的出版物是 **"可靠来源"**，**(i) 他们本应使用伯尔尼联盟主管机构在 1978 年之后通过的决议**，(ii) **如果想使用知识产权组织的《伯尔尼公约指南》，他们本应使用 25 年后即 2003 年出版的新指南。**



The new WIPO Guide published in 2003 – not only for developing countries – in which it is made clear that, for the application of the right of communication to the public, there is no need for a „new public.

2003 年的新版《世界知识产权组织指南——不仅针对发展中国家——其中明确指出，在向公众行使传播权利时，不需要 "新公众"。

The Chinese version is available free of charge at
中文版本可通过以下链接免费获取
www.wipo.int/edocs/pubdocs/zh/copyright/891/wipo_pub_891.pdf

TvCatchup: honest attempt at correction by the „specific technical means" theory – but in contradiction with the Berne Convention

TvCatchup：尝试通过"特定技术手段"理论进行修正——但与《伯尔尼公约》相悖

In its ***TvCatchup*** *(*case C-607/11) judgments the CJEU has stated as follows:

欧盟法院在其 ***TvCatchup***（C-607/11 号案件）的判决中声明：

The concept of 'communication to the public',… covers a retransmission of the works included in a terrestrial television broadcast (i) where the retransmission is **made by an organisation other than the original broadcaster,** (ii) **by means of an internet stream** [„**because it is retransmission by another „specific technical means"] (iii) even though those subscribers are within the area of reception of that terrestrial television broadcast** [that is, **there is no „new public**"] (Emphasis added.)

"向公众传播"的概念，……涵盖对地面电视广播中包含的作品的转播，(i)转播**由原广播机构以外的组织进行，(ii)通过网络流媒体进行[因为这是通过另一种 "特定技术手段"进行的转播]， (iii)即使这些用户在地面电视广播的接收区域内[即：不存在 "新公众"]** (原文无下划线)

➢**But under the Berne Convention, retransmission by the same technical means to the same public** – that is not necessarily a new one – **is equally covered:** under Article 11*bis*(1)(ii), there is an **exclusive right of rebroadcasting** (which is obviously is made by **the same technical means as broadcasting**).

➢**但根据《伯尔尼公约》，以同样的技术手段向同样的公众**——不一定是新公众——**转播也同样包涵在内**：根据第 11条第一款 (ii)目，**转播权**（显然采取**和广播相同的技术手段**）**是一项专有权利。**

Svensson: attempt to „save" both copyright and the Internet – but with formality and exhaustion

Svensson：尝试"挽回"版权和互联网，但采取形式保护和权利穷竭

In ***Svensson*** (case C-466/12), the CJEU has ruled as follows:

在 *Svensson* 案（C-466/12 号案件）中，欧盟法院裁定如下：

Article 3(1) of Directive 2001/29/EC… [on the right of communication – and making available – to the public]… must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in that provision. (Emphasis added.)

第 2001/29/EC 号指令第三条第一款……[关于向公众传播和提供的权利]……应当解释为，在一个网站上提供可点击链接，跳转到另一个网站可免费提供的作品的情形并不构成该条款所指的"向公众传播的行为"。(原文无下划线)

➢In this case**, the application of the „new public" and „specific technical means" theories would have led to the abolishment of the making available right.** The CJEU **tried to avoid this through introducing the „restricted access" theory. This resulted in a** (prohibited) **formality of protection and the exhaustion of the right of making available** (*See* www.alai.org)

在本案中，**适用"新公众"和"特定技术手段"理论废除了提供权。欧盟法院试图通过引入"限制获取"理论来避免这种情况。**这导致**保护以形式存在（被禁止）和提供权利的穷竭。**(见 www.alai.org)

Opening for the application of the *implied license* doctrine and the *innocent infringement* defense (1)
*默示许可*原则和*无辜侵权*抗辩的适用范围 (1)

In the *GS Media* case (Case C-160/15), the summary of the judgement reads as follows:
在 GS Media 案（C-160/15号案件）中，判决摘要如下：

„Article 3(1) of Directive 2001/29/EC… must be interpreted as meaning that, **in order to establish whether** the fact of posting, on a website, **hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public'… it is to be determined whether** those links are provided **without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature** of the publication of those works on that other website **or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed**."

"第 2001/29/EC 号指令第3条第（1）款……应解释为，**为确定**在网站上发布**指向受保护作品的超链接**这一事实**是否构成'向公众传播'**，而这些超链接是**在未经版权持有人同意的情况下在另一个网站上免费提供的**……。**要确定一点**，提供该类链接的人**是否不谋求经济利益，是否不知道或不可能合理地知道在其它网站上发布该类作品的非法性质，或者相反，提供这些链接是否出于该种经济牟利目的，是否在这种情况下能推定为其知晓情况。**"

Opening for the application of the *implied license* doctrine and the *innocent infringement* defense (2)
*默示许可*原则和*无辜侵权*抗辩的适用范围 (2)

In *Soulier* (Case C-160/15), the CJEU has quite clairly referred to an implied license basis of its *Svensson* judgment:

在 *Soulier* 案（欧盟法院 C-160/15 号案件）中，欧盟法院非常明确地提到了 Svensson 判决中的默示许可基础：

34 …[S]ubject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, **any use of a work carried out by a third party without… prior consent must be regarded as infringing** the copyright in that work (see, to that effect, judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraphs 24 and 25).

第 34 段 […]除第 2001/29 号指令第 5 条详尽规定的例外情况和限制外，**第三方未经……事先同意而使用作品的，应视为侵犯该作品版权**（参见 2014 年 3 月 27 日的判决，UPC Telekabel Wien，欧盟法院 C-314/12号案件，EU:C:2014:192，第 24 和 25 段）。

35 Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that **those provisions also allow that consent to be expressed implicitly**. (Emphasis added.) For the reference to *Svensson* in this context, see the following slide:

第 35 段 尽管如此，第 2001/29 号指令第2(a)项和第3条第一款并未规定作者表达事先同意必须用哪种方式，因此这些条款不能被解释为要求必须明确表达同意。相反，必须认为**这些条款也允许含蓄表示的同意**。(原文无下划线）**关于此处提及的斯文森，见下一页：**

Opening for the application of the *implied license* doctrine and the *innocent infringement* defense (3)
*默示许可*原则和*无辜侵权*抗辩的适用范围 (3)

Soulier:

***Soulier* 案**:

In paragraph 36, the Court has **referred to *Svensson*** as an example of the application of implied licenses in this way: **"the Court held that, in a situation in which an author had given** *prior, explicit and unreserved* **authorisation to the publication of his articles on the website** of a newspaper publisher, **without making use of technological measures** restricting access to those works from other websites, **that author could be regarded, in essence, as having authorised the communication of those works to the general internet public**."

在第 36 段中，法院**提述 Svensson** 案，说明了暗示许可的适用情况："**法院裁定，在作者***事先*、*明确*、*无保留地***授权在报纸出版商的网站上发表其文章**，**而没有利用技术措施**限制从其它网站访问这些作品的情况下，**可当作该作者实质上已授权向广大互联网公众传播这些作品**"。

A CJEU judgement *de facto* rejecting „new public" theory: *Renkhoff*
欧盟法院的一项判决事实上否定了"新公众"理论：*Renkhoff* 案

Judgment of the CJEU in *Land Nordrhein – Westfalien v. Dirk Renkhoff* (case C-161/17) -- adopted in August 2018 (also referred to it as ***„Córdoba"***):

欧盟法院于 2018 年 8 月通过的北莱茵-威斯特法伦州诉德克-伦克霍夫 案（C-161/17 号案件）的判决（亦称 "***Córdoba*** 案"）：

The concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC… **must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.**

第 2001/29/EC 号指令第3条第一款所指的 **"向公众传播"概念……应解释为涵盖以下情形：在一个网站上发布之前在另一网站上已发布过的照片，该另一网站没有任何限制阻止其被再次下载，并经版权持有人同意向其它网站发布。**

THANK YOU
谢谢

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