

FIRST SALE DOCTRINE IN INDIA WITH SPECIAL REFERENCE TO DIGITAL COPYRIGHT WORKS

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Abstract

The First Sale doctrine stipulates that the distribution rights of a copyright holder are depleted with respect to a certain copy-protected work once they have distributed a single copy of it. Now, the purchaser may resell that specific copy of the work. The doctrine facilitates the development of a secondary market for copyrighted works. In India, section 14 of the Copyright Act, 1957 contains the provision on the First-sale doctrine. This paper examines the concept and evolution of the doctrine with special reference to the copyright laws of the United States of America and the United Kingdom. It discusses the application of the doctrine with the help of case laws. The primary focus of this study is on the applicability of the First-Sale Doctrine to digital and electronic copies within the context of India. Various United States of America and European Union case laws have been analysed while discussing digital exhaustion in India. It has been observed that digital exhaustion if it is implemented in India has several advantages, such as the creation of a secondary market and the promotion of innovation. On the other hand, disadvantages include the risk of infringement and violation of the copyright holder's reproduction rights. Consequently, a balanced strategy should be utilized to resolve the issue. Various technologies must be adopted and international standards must be established to account for Digital Exhaustion.

Keywords: First-Sale Doctrine, Digital Exhaustion, Copyright Act, Secondary market

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1. Introduction

The basic tenet of copyright law is to achieve a balance between the right holder's ownership rights and the person who comes into possession of the copy's tangible property.¹ In accordance with this doctrine, if a copy already in circulation is the subject of a lawful transaction between a copyright holder and any other person, the copyright holder loses his or her distribution right over that copy. According to a common law principle, no restrictions or conditions should be placed on a property when it is conveyed to another individual. If the transferee is subject to such a restriction or condition in India, the transfer is null and void. In India, the transfer of any tangible property is unrestricted. After the transfer, the previous proprietor has no claim to the property and has no control over subsequent transfers. Therefore, in the case of tangible property such as a book, the transferee has absolute ownership, he may resell it, and the transferor cannot impose any restrictions on it. However, the author's intellectual property, which is embedded within the book, cannot be transmitted. Thus, in the case of tangible property, the right to disseminate that specific copy of physical property that is already in circulation is forfeited by the owner of the copyright to that particular property.

People depend on the Internet due to the significant advances in science and technology that have occurred in recent years. Nothing can be accomplished without the Internet. The impact of technology has led to a preference among people for reading electronic books. The lawmakers amend the legislation since the public's tastes have changed due to the fast growth of technology.

The First Sale Doctrine addresses mainly the physical copies but falls short when it comes to digital and electronic publications. People are increasingly reliant on e-books, digital copies, etc., as opposed to physical tangible copies, as a result of the development of technology. From any website, it is easy to acquire electronic books and digital copies. Additionally, it takes a lot less time than visiting a bookshop or ordering a hard copy of a book online. Nowadays, in the age of the internet, it is typical for copyrighted materials to be shared not by physical copies being sent, but by temporary broadcasts over the digital network that the recipient may watch or hear but cannot preserve. However, this

¹ Peter Mezei, *Copyright Exhaustion Law and Policy in the United States and The European Union 7* (Cambridge University Press, England, 2018).

raises the question of whether the proprietor of the digital copy or e-book is granted ownership rights. In the case of a digital file, licences are granted to consumers, but they do not acquire ownership. Believing that they own the digital copy is a common misconception. Many individuals are confused by this concept. Even though individuals pay nearly the same price for access to an e-book or a digital file, this does not imply that they have the ownership right. Now, to resolve the issue, a rigorous examination of the First-Sale Doctrine is required.

The article examines the scope of the 'First Sale Doctrine' concerning digital copyright works in India. In the process, the author will also look at the extent of the first sale doctrine in the United States and the United Kingdom, extract important analytical lessons from their respective legal frameworks, and use that comparative perspective to evaluate the relative merits and shortcomings of the Indian system and attempts to provide few solutions.

2. Exhaustion as a Legal Principle in International Copyright Protection

Countries are free to select their own exhaustion regime, such as international, national or regional. Different countries' policies on exhaustion lack uniformity, which has led to the doctrine of exhaustion and parallel import being perceived as more controversial. The Berne Convention of 1886 and the Rome Convention of 1961 have not mentioned the exhaustion principle. TRIPS and the WIPO Internet Treaties (WCT/WPPT) are international treaties/agreements that introduced the concept of exhaustion. These rules served as the basis for the nation's domestic regulation of exhaustion. Article 6 of the TRIPS agreement deals with exhaustion where it has been stated that member countries are free to determine the issue of exhaustion, but they should avoid establishing an exhaustion principle that conflicts with the principle of National Treatment and Most-Favoured nation. Article 6(2) of WCT deals with the first sale doctrine and the article 8(2) of WPPT also deal with the First Sale Doctrine.

The treaty signatories have the discretion to adopt either international or national exhaustion. Consequently, both the TRIPS and WIPO Internet treaties are mute on the exhaustion regime to be adopted by signatories. It would be preferable if the TRIPS and WIPO treaties supported international exhaustion because there are many disputes regarding the form of exhaustion followed by a particular member state.

2.1. International, National and Regional Exhaustion

The TRIPS and WIPO Internet Treaties give member states the option to choose the exhaustion regime. There are three main categories for exhaustion:

2.1.1. National Exhaustion

The National Exhaustion principle forbids bringing infringing copies from overseas into the country of origin and states that when a copy is distributed within a state, its owner forfeits any further rights to control its distribution within that state.² India follows the National Exhaustion principle.

2.1.2. International Exhaustion

The term International Exhaustion describes an exhaustion regime in which the copyright holder's worldwide distribution right is exhausted upon the first sale of any copy, at which point he loses all control over future global redistribution.³ This principle is being followed by USA.

2.1.3. Regional Exhaustion

The Regional Exhaustion regime allows a small group of countries to decide that the copyright holder's distribution rights are exhausted upon the copy's first sale within their jurisdictions. The copyright owner is then able to control the importation of the work from other countries but is unable to further restrict its resale within that region. For example, the European Economic Area follows Regional Exhaustion.⁴

3. Development of the First Sale Doctrine with special reference to the U.S.A and U.K

The First-Sale doctrine as already discussed means that when a copy of a book has been sold the copyright holder has no right with respect to that particular copy of the book. The First Sale Doctrine was mainly developed in the United States of America as well as in the European Union. The authors here highlighted the position in the U.S.A. and U.K. only.

² Manoj Kumar Sinha and Vandana Mahalwar (eds), *Copyright Law in the Digital World* (Springer, Singapore, 2017).

³ *Ibid.*

⁴ *Ibid.*

3.1. United States of America

The First Sale Doctrine is the term used to refer to the theory of exhaustion in the United States. Though the theory has a longer history, *Bobbs- Merrill Co. v. Straus*⁵ is recognised as the key case in this respect. The United States Supreme Court used the First Sale Doctrine to limit the copyright holder's ability to regulate downstream distribution.⁶

In the above-mentioned case, it is found that the books sold by the dealers are much less than the price which the copyrighted holder asked them to sell. Despite giving notice to the dealers Straus sold it at a lower price. The issues that now need to be addressed include whether the copyright owners may limit sales in the future, whether a notice is enough to manage the transaction, and whether disobeying the notice results in copyright infringement. Two important concepts were recognised by the Court which are as follows –

Firstly, the notice that is delivered in the form of a warning is only effective against resellers in the event that there is a contractual connection between the copyright holders and the seller. Secondly, the copyright holders cannot regulate the resale of copies that have already been sold.⁷

The decision has a significant impact on the formation of the First Sale Doctrine. Legislators who were involved in the formation of the Copyright statute recognised the importance of the Supreme Court's reasoning in *Bobbs-Merrill Co v. Isidor Straus and Nathan Straus*⁸ and they framed the provision of First Sale doctrine.

Before 1976, the First Sale Doctrine had a slightly different definition. Numerous courts have rendered decisions regarding the First-Sale Doctrine, and this persuaded Congress to make minimal modifications to the doctrine's definition. Currently, the First Sale Doctrine provision contains the following basic elements:

- i. There should be an owner or an authorised person.

⁵ *Bobbs-Merrill Co v. Isidor Straus and Nathan Straus*, 210 U.S. 339 (1908).

⁶ L. Donald Prutzman and Eric Stenshoel, "The Exhaustion Doctrine in the United States", New York State Bar Association International Law and Practice Section Fall Meeting, Nanoi Vietnam 9 (2013).

⁷ *Supra* note 5.

⁸ *Ibid.*

- ii. The copy has been lawfully distributed and ownership of an original or a copy of a work that is protected has changed.
- iii. The copy may now be sold by the legitimate owner without the copyright holder's consent.

In the case of *Bobbs-Merrill Co v. Isidor Straus and Nanthan Straus*,⁹ the most important aspect is the notion of consent. Thus, the first element indicates that the book's copy was sold with the copyright holder's consent. The initial distribution has been authorised by the copyright holder. Appropriate compensation has been given to the copyright owner.¹⁰

Another aspect is the lawful distribution of copies certifies that it was sold legitimately and is not a fake or pirated copy by which the ownership has been passed on to a new buyer. As a result, the copyright holder is no longer able to distribute the purchased copies. His right expires when ownership of that copy is transferred. Once the ownership is transmitted, the recipient is free to resell the copy. After selling a copy of the work, the owner of the copyright loses authority over its resale.

3.2. United Kingdom

Copyright law in the United Kingdom is governed by the Copyright, Designs, and Patent Act, 1988. The Act of 1988 states that copyright protects original pieces of literary works, dramatic works, music, sound recordings, films, and typography.¹¹ The provision for public distribution of copies or distribution rights is included in Section 18 of the Act of 1988. The issue of copies to the general public is one of the copyright-restricted actions in all works.

Several European Council Directives have addressed the United Kingdom's distribution right; two of them are the 'Information Society Directive' and the 'Computer Software Directive and the Related Rights Directive'. The Section 18¹² of the Act of 1988

⁹ *Supra* note 5.

¹⁰ *Supra* note 1.

¹¹ Copyright Designs and Patents Act, 1988, s.2.

¹² Section 18 of the Copyright Designs and Patents Act, 1988 of the United Kingdom states that "(1) The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.

(2) References in this Part to the issue to the public of copies of a work are to the act of putting into circulation in the United Kingdom copies not previously put into circulation in the EEA by or with the consent of the copyright owner.

(3) References in this Part to the issue to the public of copies of a work do not include—

needs to be amended in order to comply with the “Computer Software Directive and the Related Rights Directive”. Article 4 of the Infosoc (Information Society Directive) mandated that members adopt a wide distribution right when it became operative in 2001. The main provisions of the Infosoc Directive concerning distribution rights are found in Articles 3(3)¹³ and 4(2).¹⁴

The Doctrine of Exhaustion is recognised in the United Kingdom by the Copyright, Designs and Patents Act of 1988. If there are any copies that are not in use at the moment, only the copyright holder may distribute them. This indicates that for copies that have already been disseminated, the copyright holder does not have any distribution rights. In the UK, the copyright holder’s distribution rights within the European Economic Area (EEA) are nullified upon the copy’s first sale. As a result, the only authority to distribute brand-new, unsold copies belongs to the copyright holder. In the UK, the Exhaustion Doctrine aims to reconcile the interests of copyright holders with the unhindered flow of commerce and ownership of tangible goods.¹⁵

Traditionally, digital copies of a protected work are not covered by the Exhaustion of Distribution privilege; only physical copies are. This aligns with Recitals 28 and 29 of the Infosoc Directive.¹⁶

(a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 18A: infringement by rental or lending).

(4) References in this Part to the issue of copies of a work include the issue of the original.”

¹³ Article 3(3) of the 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 states that “The rights referred to in paragraphs 1 and 2 [communication to the public and making available] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

¹⁴ Article 4(2) of the 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 states that “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 right holder or with his consent.”

¹⁵ Lauren McFarlane, “UK’s Copyright Exhaustion Regime – The Story So Far”, *available at*, <https://www.scottishlegal.com/articles/lauren-mcfarlane-uks-copyright-exhaustion-regime-the-story-so-far> (last visited on June 24, 2023).

¹⁶ Recital 28 of the 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 states that “Copyright protection under this Directive includes the exclusive right to control the distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the right holder or with his consent exhausts the right to control resale of that object in the Community ...”

Recital 29 of the 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 states that – “The question of exhaustion does not arise in the case of services and online services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such

The concept of exhaustion is not limited to any one category by Section 18. As a result, the idea suggests that it is applicable to every work. Both the Software Directive and the Infosoc Directive must be followed when interpreting the software and musical works, respectively.

3.3. Provision of Property Law to Support the First Sale Doctrine in India

Section 10 of the Transfer of Property Act, 1882 states that a restriction or limitation that prevents the transferee or anybody claiming under him from giving up or selling his interest in the property is invalid when it applies to the transfer of property. Therefore, if a bicycle is sold, the transferee cannot impose conditions on the sale. There should be no restrictions or conditions on the transfer. If any restrictions are imposed, the conditions shall be considered null and void. Even Section 11 says that a person has the right to receive or dispose of an absolute interest as if there were no such direction if the interest is formed in their favour, but must be enjoyed in a certain way. Consequently, a transfer or the creation of an interest must always be unconditional and unfettered. If any interest is created and if it is provided that the interest will be enjoyed in a certain particular manner, then the person in whose favour the interest is created will enjoy the interest in such a manner as if there is no such direction. Therefore, when a book is sold, the customer is free to resell it, and the copyright holder cannot impose restrictions. Thus, the copyright holder may publish copies of the works, but not ones that are already in circulation, suggesting that the holder may publish fresh copies of the works. He has no authority to reissue previously sold books. Therefore, the distribution rights of the copyright holder will be exhausted concerning the sold copies. The purchaser may resell it.

4. First Sale Doctrine under the Copyright Law in India

In India, the Copyright Act, 1957 includes the First Sale Doctrine. The issue of copies, which refers to fresh copies of the work rather than copies that are already in circulation must be taken into consideration in order to fully understand the concept outlined in the Copyright Act. Consequently, the First Sale Doctrine which exhausts the owner's rights with regard to copies already in circulation - is a part of the Indian Copyright Act. Within the Copyright legislation, Section 14 (a)(ii) states that the First-

a service with the consent of the right holder. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is an act which should be subject to authorization where the copyright or related right so provides.”

Sale Doctrine applies to literary work¹⁷. Section 14(a)(ii) of the Copyright Act contemplates that the copyright owner shall have the right to circulate the work excluding those copies which are already in circulation. Since the owner of the computer programme is also entitled to rights which are mentioned in section 14(a), apparently it may appear that First Sale Doctrine is applicable to computer programme as well. But when we come to Section 14(b)(ii) it is stated that the owner of the computer programme has the right of sale and the right of rental. Now the question is that can right of sale include right of resale. In this case then how to read these two provisions. In view of this it may be contemplated that the gratuitous transfer of a copy of a computer programme can be covered by the First Sale. As far as commercial sale is concerned, First Sale Doctrine is not applicable. This is very theoretical in nature. The doctrine is applicable to dramatic as well as musical and artistic works.

Concerning the First Sale Doctrine in India, *John Wiley & Sons Inc. & Others v. Prabhat Chander Kumar Jain & Others*¹⁸ case is very significant because in this case the court gave the interpretation of the applicability of National Exhaustion principle in India. In the case of *John Wiley & Sons Inc. & Ors v. International Book Store & Anr.*,¹⁹ it has been held that the copies that were sold to western countries are considered as infringing copies and hence it is an infringement under Section 51 of the Copyright Act.

4.1. Does the First Sale Doctrine apply to Digital Copies? - A Critical Analysis

Whenever digital content is transferred, it involves the payment of money. The only distinction between this and a physical book is that digital works have several limitations placed on its use. The most important thing here is that customers usually do not understand the difference between a physical book and an e-book, they think that after buying an e-book they have full ownership right over the book, but in reality, it is a myth. There is no such Digital First Sale Doctrine that exists.

It is observed that in the *UsedSoft*²⁰ case, if any End-User License Agreement (EULA) is signed and the license is granted for an indefinite period, then that transaction would be regarded as a Sale in cases of computer or computer software, and In the event that such computer application is sold again, the First Sale doctrine applies, meaning the

¹⁷ The Copyright Act, 1957, (Act 14 of 1957).

¹⁸ 2010 (44) PTC 675.

¹⁹ 7 CS (OS) 2488 / 2008.

²⁰ *UsedSoft GmbH v. Oracle International Corp.* Case C-128/11, ECLI:EU:C:2012:407.

computer programme's owner has no say over whether or not it is sold again. In the case of *Vernor v. Autodesk*,²¹ it was held that the transaction is considered a license if the use and transfer of the software are subject to numerous restrictions.

In this context, it is crucial to distinguish between the Licence and the Sale. In the case of a digital file transmission, it remains to be seen how courts have distinguished licence from sale. The First Sale Doctrine can be utilised by the owner, but not by the licensee.²² It has been observed, however, that distinguishing ownership or a Sale from a licence can be challenging, because in both instances there is a monetary exchange, and under certain circumstances, the deal qualifies as a Sale, while in others it is considered a licence.²³ In most cases, the transfer of title from the seller to the buyer constitutes a Sale. However, there is no title transmitted in the case of transfer of digital copyright works, so the transaction is classified as a licence. A licence confers both rights and limitations, whereas ownership confers unrestricted usage.²⁴

The case law that governs the License v. Sale Dichotomy is the *UsedSoft*²⁵ wherein it has been observed that a license granted permanently for a charge can be considered a Sale. Christopher Stothers said that the European Court of Justice (ECJ) has no jurisdiction to restrict the compensation that right-holders might get, in spite of opposition from a number of critics.²⁶ In the case *Vernor v. Autodesk*, it was determined that three factors determine whether an individual is a licensee or an owner of the copy of the work. The following are these elements: - (a) whether the owner of the copyright grants a licence, (b) Whether the owner limits the user's capacity for transferring the software, and (c) Whether the owner limits access.²⁷

If the copyright holder imposes both transfer and use limitations, the user is considered a licensee rather than the owner of the software. In the case of *ReDigi*²⁸, the Court has not discussed the license versus Sale Dichotomy. From the facts and decisions, however, it can be inferred that the Court viewed the purchase of iTunes files as a sale

²¹ *Timothy S. Vernor v. Autodesk, Inc.*, 555 F.Supp.2d 1164 (2008).

²² *Supra* note 1.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Nengimote Daphne Diriyai, *To Be or Not To Be? Constructing a Digital Exhaustion Doctrine in the EU and US* (2014) (Unpublished Master's Dissertation Tilburg University).

²⁶ *Supra* note 1 at 119.

²⁷ *Ibid.*

²⁸ *Capitol Records, LLC v. ReDigi Inc.*, 910 f.3d 649 (2d cir. 2018).

rather than a licence.²⁹ So, considering the different judgments it can be concluded that the transaction of copyrighted material that contains restrictions on the use and distribution of such material is a license. On the other hand, allowing someone to use a copyrighted material permanently in consideration of money is a Sale, not a license and on a transaction of this kind, the First Sale Doctrine applies.

In U.S.A there is no application of 'First-Sale Doctrine' to the digital copies or e-books because it has been held in the judgment of *ReDigi*³⁰ that transfer of digital copies electronically will constitute reproduction that will violate the right of reproduction of copyright holder. In the United Kingdom, there is no specific provision regarding online exhaustion. According to the European Union and other international laws, it is possible to assert that distribution rights in the United Kingdom can only be applied to physical copies of the work. On the other hand, the Software Directive has been regarded as *lex specialis*, and in accordance with this directive, any copy of software is regarded as an intangible copy. European law has a significant impact on copyright law in the United Kingdom, and courts there are obligated to interpret domestic legislation in conformity with rulings from the Court of Justice for the European Union (CJEU). For this reason, based on the standards set out in the *UsedSoft* ruling, it may be inferred that the right of distribution in the case of computer programme may be exhausted, independent of whether the program is intangible or physical. However, with regard to other digital data, the principle of exhaustion is inapplicable. In the United Kingdom, there are neither explicit judicial rulings nor legislation requirements that address the issue of digital exhaustion. Another significant aspect of the Act is that it does not discriminate between the physical and the intangible mediums in which the copyrighted work might exist. This is an essential aspect of the Act. In the UK, it is difficult to distinguish between works that are generated digitally and those that are produced physically. Aside from the software program, it is not evident at all whether the law of exhaustion even applies to digital content.

²⁹ *Ibid.*

³⁰ *Supra* note 28.

4.2. A Critical Review of the Application of the First Sale Doctrine to Digital and e-Copies in India

The Copyright Act has not mentioned any form of medium in which the Intellectual Property is embedded, and it has not distinguished between the tangible and intangible platforms in which the copyright is embedded. A quick glance will convey the concept that the copyright owner's distribution rights are exhausted with respect to a given copy upon the first sale. Now based upon the laws of the U.S.A. it can be said that copyright exhaustion cannot be applied to any resale of a digital file, while on the other hand, in the European Union if the transfer of any software is made for an unlimited period then that would be regarded as sale and not as a license based on the *UsedSoft* case, but the same thing does not apply to other digital files.

The most critical point is that in *ReDigi's* case, it has been stated that the transfer of digital files electronically to another place constitutes reproduction. Therefore, it is certain that the right of reproduction will be violated because if a digital file is transmitted it will create another copy after transmission. Regarding this, technology remains mute. Therefore, it is not very possible to apply the First Sale Doctrine to digital files in India because, according to Section 14 of the Copyright Act, the holder of the copyright has the exclusive right to reproduction, and any infringement on that right would be considered copyright infringement.

As per the provision of the Act, the copyright owner may distribute copies of the original work, not being the copies that has already been in circulation. Applying the First Sale Doctrine to tangible goods like books is simple because when a person, has bought a book from a publisher and is reselling the book, after resale, such seller has no possession of that copy and the subsequent purchaser is getting possession of that particular copy which the reseller has sold. However, applying the theory to digital copies is particularly challenging since downloading an e-book or digital copy makes a duplicate of the original work. Making a fresh copy is the same as reproduction, and doing so is against the law.

Regarding the applicability of the First Sale Doctrine to digital copies or e-books, there is no case law in India. Therefore, drawing a result that would uphold the idea that digital copies, or e-books, fall under the First Sale Doctrine is difficult. Furthermore, the Copyright Act of 1957 forbids the possibility of applying the First Sale Doctrine to digital

works in India *via* Sections 65A and 65B, which include a clause on Technological Protection Measures (TPM) and Digital Rights Management (DRM).³¹

4.2.1. *Arguments against Digital Exhaustion in India*

The authors are of the view that it is very logical not to accept Digital Exhaustion in various jurisdictions. Digital Exhaustion will bring a lot of problems if it is compared to the exhaustion of distribution rights of the copyright holder of any copyrighted work in any tangible medium. One of the most general problems is that the digital copies are equivalent to the original work, and there are no restrictions on its usage; it can be used repeatedly and it is easy to copy without reducing the quality during reproduction. So, the effect will be upon the downstream commerce of business by decreasing the demand for the original which in turn would affect the rights holders.

The problem associated with digital works is that they can be reproduced easily. At the same time, in the case of a tangible medium, in the case of copying, there will be a large expenditure as huge labour and financial costs are involved.³² Whenever digital work is transmitted electronically, there will be no barrier to time and place. Any person can receive any digital work from any part of the world instantaneously. Again, digital work cannot be reduced in quality; it will remain as it is unlike the physical books.

Another important thing is to be understood in the case of the resale of any digital work; there is always a reproduction of a new copy. Without reproduction, resale is not possible. Distribution over the internet necessitates the creation of copy. So, each resale will violate the reproduction rights of the owner of the Copyright.

An EULA is another feature of digital work. Therefore, there are number of limitations on the end-user's ability to use, reproduce, and modify the work. The end-user is only getting the right to access, but not the right of ownership. So, if the exhaustion principle is allowed in the case of online transmission, it will not apply to end-users because they are not owners, but only licensees.³³

³¹ Technological Protection Measures (TPM) are any digital management tools that restrict what users can do with digital content. TPM may also be called Digital Rights Management (DRM). In India Section 65A and Section 65B of the Copyright Act of 1957 deals with these aspects.

³² *Ibid.*

³³ See *Vernor v Autodesk Inc.* 621 F.3d 1102 (2010).

The purpose of the technical protection measures is to regulate how digital material is used, accessed, and reproduced. India forbids using the TPM as a means of economic gain. Therefore, it is unlawful to bypass copyrighted content in the secondary market if there is both TPM and the digital exhaustion principle. These are the arguments that make it quite evident that digital exhaustion is not possible in India.

4.2.2. *Arguments in favour of Digital Exhaustion*

The primary justification for digital exhaustion in India is that the copyright holder would unfairly profit from a monopolistic situation, if there was no digital exhaustion.³⁴

In the Secondary market, the works are sold at a less expensive price. Based on the economic condition in India, it is indispensable to allow the secondary market in India, because many people can afford to buy the work. In this way, society would benefit from the secondary market. The First-Sale Doctrine's advantages include accessibility and cost. So, the people who cannot afford to buy the works from the primary market can buy from the secondary market at a lesser rate. In the case of the secondary market, the works will be available to more and more consumers. For applying the digital exhaustion doctrine in India, the copyright owner should be given fair and adequate royalties the very first time. The digital secondary market will boost innovation, which is one of its main advantages.

In order to stay competitive with the secondary market and set their copies apart from those offered there, right holders will alter their goods. Software often has the ability to download updates and add-on functionality. It also encourages the creation of new business models.

4.2.3. *A Balanced Approach for a Digital Exhaustion Doctrine*

It is possible to achieve a Balanced Digital Exhaustion by combining technical and regulatory measures.³⁵ There are certain technological measures through which digital exhaustion can be applied in India. Hess suggested the introduction of Aging

³⁴ *Supra* note 1 at 149.

³⁵ *Ibid.*

technology.³⁶ With the help of the aging technology, the quality of the file will be degraded with its subsequent use. It will act like a physical copy.³⁷

The other technological measure is the unique ID number which will be inserted in the metadata before being sold by the original seller.³⁸ In case of resale, only the copy where the unique ID is tagged would become eligible for subsequent sale. Only right holders and retailers can tag the unique ID number.

Another technological measure is the Forward and Delete Technology.³⁹ In this method, the copy will be automatically deleted from the retailer's computer and he will not retain any further copy. Though, there are several criticisms regarding this measure as in the case of *Redigi*, it has been held even in the case of Forward and Delete Technology, Reproduction takes place. Nevertheless, it is an excellent step toward implementing the Digital Exhaustion Doctrine.

Another technology that may be employed is Blockchain Technology, which has the major benefit of being able to record all transaction-related data chronologically.⁴⁰ So, in the case of a sale, it is difficult to invalidate any transaction because all the transactions are valid.

In order to put the Digital Exhaustion Doctrine into practice, appropriate international and national standards governing the electronic transmission of digital copies are necessary. As a result, the retailer will be required to destroy any copies that have been sold and will not be allowed to keep any copies on hand.

5. Conclusion

A straightforward interpretation of the Transfer of Property Act of 1882 and Section 14 of the Copyright Act of 1957 does not distinguish between intangible and material copies. Therefore, one may claim that the First Sale concept applies to digital copies; yet, another could argue that the First Sale doctrine does not apply to electronic documents and digital books since it infringes the copyright holder's reproduction right, based on case law and other factors. Thus, in order to apply the First Sale Doctrine to

³⁶ Evan Hess, "Code-ifying Copyright: An Architectural Solution to Digitally Expanding the First-Sale Doctrine" 81(4) *Fordham Law Review* 1965 (2013).

³⁷ *Ibid.*

³⁸ *Supra* note 1.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

digital data in India, technology is needed. The Aging technology, the Forward and Delete method can be implemented. Nonetheless, it has numerous defects. Thus, it is evident from a straightforward reading that e-books and digital copies may be covered by the First Sale theory. The idea, however, does not apply to electronic books and digital information in the same way as it does to physical books. As such, technology that does not infringe upon the copyright holder's reproduction rights while yet enabling the application of the doctrine is necessary to remedy this problem.